Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

BIDDLE STREET BISTRO, INC.,
Petitioner

v.

TLJ COMPANY, L.L.C. AND
BREMEN BANK AND TRUST COMPANY,
Respondents

On Petition For Writ Of Certiorari
To The United States
Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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134 pp

QUESTIONS PRESENTED

(1) Whether the Federal Rules of Appellate Procedure require that a notice of appeal be signed for a United States Court of Appeals to have jurisdiction.

(2) Whether the filing of a timely Notice of Appeal signed only by pro se shareholders on behalf of their corporation is a fatal error that requires the corporation's appeal to be dismissed.

PARTIES IN THE COURT BELOW

1. Petitioner, Biddle Street Bistro, Inc., was a Defendant below. Biddle Street Bistro, Inc. has no parent companies or subsidiaries not wholly owned by the corporation. No publicly held company owns ten percent or more of the corporation's stock. The corporation was wholly owned by shareholders Jeffery Eilers and Janet Y. Tennant.

2. Respondent, TLJ Company, L.L.C., was a Defendant below. TLJ Company, L.L.C. has no parent companies or subsidiaries not wholly owned by the corporation. No publicly held company owns ten percent or more of the TLJ Company, L.L.C.

3. Respondent, Bremen Bank and Trust Company, was a Defendant below. The parent company of Bremen Bank and Trust Company is Bremen Bancorp, Inc. Bremen Bank and Trust Company has no subsidiaries not wholly owned by it and no publicly held company owns ten percent or more of it.

4. No review is sought here as to the Plaintiff below, Allstate Insurance Company.

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I. The United States Court of Appeals for the Eighth Circuit erred in dismissing Biddle Street Bistro's notice of appeal for lack of jurisdiction for failure to file a valid notice of appeal because the notice of appeal met the requirements of Federal Rule of Appellate Procedure 3(a) in that it specified the parties taking the appeal, designated the judgment being appealed, and named the Court to which the appeal was taken; Federal Rule of Appellate Procedure 3(a) contains no jurisdictional mandate that a notice of appeal contain any signature to be valid

II. The United States Court of Appeals for the Eighth Circuit erred in denying Biddle Street Bistro's motion to submit corrected notice of appeal and adopt pleadings previously filed pro se because Biddle Street Bistro promptly sought to correct the omission of a signature of counsel after the Clerk called to the attention of Biddle Street Bistro the alleged defect in the notice of appeal in that Federal Rule of Civil Procedure 11(a) provides that an unsigned paper shall be stricken unless the omission of the signature is corrected after being called to the attention of the attorney or party 12

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORT OF OPINIONS

There is no official report of the opinions or orders entered in this case. The order of the Eighth Circuit Court of Appeals denying rehearing is set forth in the appendix at page A-110. The judgment of the Eighth Circuit Court of Appeals denying appellants motion for leave to submit a corrected notice of appeal and to adopt pleadings previously filed pro se, and dismissing appeal for lack of jurisdiction for failure to file a valid notice of appeal is set forth in the appendix at page A-95.

JURISDICTION

The Petitioner filed its Petition for Rehearing by Panel on February 25, 2003. The Eighth Circuit denied Petitioner's Petition for Rehearing on March 12, 2003. This petition is being filed within 90 days of the Eighth Circuit's order denying the petition for rehearing by panel pursuant to Supreme Court Rule 13.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal Rule of Appellate Procedure 3(c) provides.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plain-

tiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment, order, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

(5) Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

Federal Rule of Civil Procedure 11 provides:

(a) Signature. Every pleading, written motion and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is

corrected promptly after being called to the attention of the attorney or party.

(b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of that person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by the existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms,

or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by

others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiation unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) **Inapplicability to Discovery**. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

STATEMENT OF THE CASE

Biddle Street Bistro (hereafter BSB) was a corporation created by its sole shareholders Janet Y. Tennant and Jeffrey Eilers to run a restaurant located at 220 Biddle Street in the City of St. Louis. BSB operating under the name J. Tennant Construction owned the property on which the restaurant was located. In 1997, due to financial difficulties, BSB entered into an agreement with TLJ Company, L.L.C. (hereafter TLJ) wherein BSB transferred the deed to the property to TLJ in exchange for a commercial lease with an option to re-purchase the property. A condition of this lease was that BSB had to provide premises liability insurance to protect the real estate, and list TLJ and TLJ's mortgagee Bremen Bank and Trust Company (hereafter Bremen) as loss payees. BSB purchased the required coverage from Allstate Insurance Company. The premises liability insurance policy provided $100,000.00 in coverage for personal property damage, and $500,000.00 in coverage for building damage.

A dispute arose between TLJ and BSB, and TLJ refused to grant an extension to BSB's lease. After TLJ refused to recognize its contract with BSB, BSB contacted its insurance agent and asked for TLJ and Bremen to be removed as named payees. BSB then filed suit in the Circuit Court for the City of St. Louis to enforce its contractual right for an extension of the lease. Unknown to BSB, representatives of TLJ contacted BSB's insurance agent and requested to be put back on BSB's policy as named payees. The insurance agent complied with TLJ's request without notifying BSB.

While BSB's suit to enforce its lease with TLJ was pending the property was destroyed by fire. Allstate Insurance Company filed an interpleader suit in the

United States District Court, Eastern District of Missouri, Eastern Division. BSB was represented by counsel licensed to practice before the Eastern District. BSB's counsel filed an answer and motion for partial summary judgment for the $100,000.00 personal property coverage. The district court awarded the entire $100,000.00 of the personal property coverage to BSB.

After it was awarded $100,000.00 for the personal property policy limits, despite repeated and diligent efforts, BSB's shareholders were unable to contact their counsel of record. The district court then granted TLJ's and Bremen's motions for summary judgment, and awarded the entire amount of the $500,000.00 policy for building damage to TLJ and Bremen. Because of the unresponsiveness of its attorney of record, BSB's shareholders were unaware of TLJ's and Bremen's motions for summary judgment and the district court's order granting them until August 20, 2002, the day before that court's order became final.

BSB filed its Rule 60(b) motion and notice of appeal to the United States Court of Appeals for the Eighth Circuit within the time required by FRAP 4(a)(1)(A). The docket fees required by FRAP 3(e) were also paid in a timely fashion. At the time BSB filed its notice of appeal, BSB was still represented by counsel authorized to practice before the Eastern District and Eighth Circuit. However, due to his unavailability, Eilers and Tennant filed the notice of appeal on behalf of BSB on August 21, 2002 as pro se shareholders.

Eilers and Tenant on behalf of BSB subsequently filed a corporate disclosure statement and a designation of record in a timely fashion. The Eighth Circuit Clerk then provided a scheduling order. BSB met all of the filing deadlines with pleadings that conformed to

all Federal Rules of Appellate Procedure and Eighth Circuit Local Rules regarding form and content. BSB then filed an Appellant's Brief within the required time.

Appellees TLJ and Bremen then filed a brief. Appellees did not contest the Eighth Circuit's jurisdiction and responded to BSB's Brief on its merits. This matter was then sent to screening for oral argument. BSB's counsel of record was then granted leave to withdraw as BSB's counsel. Within the time allowed to respond to Appellees' Brief, Eilers and Tennant filed a Reply Brief on behalf of BSB as pro se shareholders.

In correspondence received from the Eighth Circuit Clerk dated November 18, 2002 (A-10), the clerk acknowledged receipt of BSB's Reply Brief, but indicated that a corporation cannot proceed pro se by its shareholders or officers, and that as a result BSB's notice of appeal was subject to being stricken, and its appeal was subject to dismissal. The clerk apologized for not noting this earlier, but stated that the validity of a notice of appeal was a jurisdictional issue that the court could examine at any time. The clerk indicated that as a courtesy he would hold the appeal in abeyance for thirty days to permit Eilers and Tennant to retain legal counsel and validate their prior filings.

Counsel entered an appearance for BSB, and within thirty days filed a Motion for Leave to File Pleadings and Briefs Previously Filed Pro Se and a Motion to Submit Corrected Notice of Appeal and Adopt Pleadings Previously Filed Pro Se. With the motions, all pleadings and briefs previously filed pro se were refiled bearing BSB's new counsel's signature. The Eighth Circuit denied BSB's motions on February 12, 2002 and dismissed its appeal for lack of jurisdiction for failure to

file a valid notice of appeal. (A-95). Within the required time BSB filed a petition for panel rehearing. On March 12, 2003 the Eighth Circuit entered its Order denying BSB's petition for rehearing. (A-110).

Jeffrey Eilers and Janet Tennant assert that their civil liberties have been infringed upon in that they were unable to represent their closely held corporation because the Eighth Circuit Court of Appeals refused to recognize their notice of appeal, and dismissed BSB's appeal without the opportunity for a hearing on the merits. Without reference to federal rules or statutes, the Eighth Circuit added an additional jurisdiction requirement for the hearing of an appeal as of right. In so doing the Eighth Circuit denied the right of Jeffrey Eilers and Janet Tennant to be heard.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT ERRED IN DISMISSING BIDDLE STREET BISTRO'S NOTICE OF APPEAL FOR LACK OF JURISDICTION FOR FAILURE TO FILE A VALID NOTICE OF APPEAL BECAUSE THE NOTICE OF APPEAL MET THE REQUIREMENTS OF FEDERAL RULE OF APPELLATE PROCEDURE 3(A) IN THAT IT SPECIFIED THE PARTIES TAKING THE APPEAL, DESIGNATED THE JUDGMENT BEING APPEALED, AND NAMED THE COURT TO WHICH THE APPEAL WAS TAKEN; FEDERAL RULE OF APPELLATE PROCEDURE 3(A) CONTAINS NO JURISDICTIONAL MAN-

DATE THAT A NOTICE OF APPEAL CONTAIN ANY SIGNATURE TO BE VALID.

The Federal Rules of Appellate Procedure do not require that notices of appeal be signed for an appellate court to have jurisdiction. This Court has held that the requirement that a notice of appeal be signed is not jurisdictional.

> Federal Rule of Appellate Procedure 3(a) provides, in pertinent part, that "[a]n appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4." Rule 3(c) governs the content of notices of appeal: Notices "shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken." Courts will liberally construe the requirements of Rule 3. *Smith v. Barry*, 502 U.S. 244, 247, 112 S.Ct. 678, 680 (1992).

This Court in *Becker v. Montgomery*, 532 U.S. 757, 121 S.Ct. 1801 (2001) also held that Federal Rule of Appellate Procedure 3(c)(2) does not dislodge the signature requirement from its Civil Rule 11(a) moorings and make it an Appellate Rule 3 jurisdictional specification. *Id.* at 532 U.S. 757, 759, 121 S.Ct. 1801, 1803 (2001). In *Becker*, this Court reasoned that the requirement that a notice of appeal be signed when filed in the district court only comes from Federal Rule of Procedure 11(a) which provides that every paper filed with the district court shall be signed. *Id.* at 532 U.S. 757, 758, 121 S.Ct. 1801, 1805 (2001). Accordingly, this Court found that a failure to sign a notice of appeal as required by Civil Rule of Procedure 11(a) could not require

dismissal of an appeal because Rule 11(a) itself states that the omission of a signature may be corrected promptly after being called to the attention of the attorney or party. This Court also noted that this conclusion was in harmony with Federal Rule of Appellate Procedure 3(c)(4) which provides: "An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice." *Id.* at 532 U.S. 757, 759, 121 S.Ct. 1801, 1807-1808 (2001 citing *Smith v. Barry* (*supra*) at 502 U.S. 244, 245, 248-249, 112 S.Ct. 678, 116 L.Ed.2d 678.

Without citing any authority in its Order, the Eighth Circuit has added is own jurisdictional requirement. Not only is this action contrary to prior decisions by this Court on this matter, it is also in violation of the spirit of the Federal Rules of Appellate Procedure. It is a hallmark of the Federal Rules of Appellate Procedure that an appeal not be dismissed for informality of form. BSB's notice of appeal complied with the requirements of Federal Appellate Rule 3(c) to the letter. Its notice of appeal specified the party taking appeal, designated the order appealed, and identified the court to which the appeal was taken. In fact, it was sufficient to allow Appellees' counsel to craft the appropriate responsive pleadings and a brief which argued the merits of BSB's appeal.

The Eighth's Circuit's dismissal also is in contradiction to the strong public policy argument that appeals should be heard and decided on their merits. At the time the Eighth Circuit dismissed BSB's appeal, Appellees had already filed their brief that responded to the merits of BSB's appeal. No party would have been prejudiced, and justice encourages all disputes to be heard.

II

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT ERRED IN DENYING BIDDLE STREET BISTRO'S MOTION FOR LEAVE TO FILE PLEADINGS AND BRIEFS PRIVIOUSLY FILED PRO SE AND MOTION TO SUBMIT CORRECTED NOTICE OF APPEAL BECAUSE BIDDLE STREET BISTRO PROMPTLY SOUGHT TO CORRECT THE OMISSION OF SIGNATURE OF COUNSEL AFTER THE CLERK CALLED TO THE ATTENTION OF BIDDLE STREET BISTRO THE ALLEGED DEFECT IN THE NOTICE OF APPEAL IN THAT FEDERAL RULE OF CIVIL PROCEDURE 11(A) PROVIDES THAT AN UNSIGNED PAPER SHALL BE STRICKEN UNLESS OMISSION OF THE SIGNATURE IS CORRECTED AFTER BEING CALLED TO THE ATTENTION OF THE ATTORNEY OR PARTY.

The majority of Circuit Courts that have considered the effect of a notice of appeal filed on behalf of corporation by a corporate officer who is not authorized to practice law have ruled that a pro se signature is not fatal to the corporation's appeal. In *Bigelow v. A & A Reality Limited,* 170 F.3d 1164 (9th Cir. 1999), the Ninth Circuit noted that there is nothing in the Federal Rules of Appellate Procedure which requires dismissal of an appeal when a corporate officer who is not licensed to practice law signs a notice of appeal for a corporation. *Id.* at page 1165. "A notice of appeal is just that – a notice." *Id.* The Ninth Circuit in *Bigelow* failed to see any compelling reason to refuse to recognize a corporation's notice of appeal, so long as a lawyer promptly thereafter enters a formal appearance on

behalf of the corporation and undertakes the representation. *Id.*

The same conclusion was reached by the First Circuit in *Instituto De Educacion Universal Corp. v. United States Department of Education*, 209 F.3d 181 (1st Cir. 2000). The First Circuit recognized that a non-lawyer could not represent a corporation in ongoing proceedings; however, the court found there was a valid distinction between ongoing legal representation and the "essentially ministerial action involved in the filing of a notice of appeal." *Id.* at page 22. The First Circuit then held that a corporate officer may sign and file a notice of appeal on behalf of a corporation, as long as the corporation then promptly retained counsel. *Id.*

Many other Circuits have held that where a corporation's notice of appeal is signed by a corporate officer who is not an attorney, the court may allow the appeal to proceed as long as an attorney admitted to practice before the appellate court has filed an appearance.[1]

The Eighth Circuit's refusal to allow BSB's notice of appeal and pleadings to be adopted by counsel was also inherently contradictory. When the Eighth Circuit first noticed that BSB's notice of appeal was signed by non-attorney shareholders, its clerk held the appeal in abeyance to allow BSB to get licensed counsel. Within the time allowed by the clerk, BSB retained licensed counsel who attempted to cure the signature defect in BSB's notice of appeal and adopt the previously filed

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[1] See e.g., *AAA Venetian Blind Sales, Inc. v. Beaufieu of America, Inc.*, 124 F.3d 196 (6th Cir. 1997); *Anunication v. West Capital Financial Services*, 97 F.3d 1458 (9th Cir. 1996); *Lewis v. Lenc-Smith Manufacuring Company*, 784 F.2d 829 (7th Cir. 1986); *K.M.A., Inc v. General Motors Acceptance Corp.*, 652 F.2d 398 (5th Cir. 1981).

pleadings. No argument was presented to the court that this action would result in prejudice to any party because responsive pleadings and briefs had already been filed. Nevertheless, the Eighth Circuit denied BSB's motion and dismissed its appeal without an opinion.

It should also be noted that BSB is a closely held corporation. BSB's notice of appeal was signed by its only two shareholders. Janet Y. Tennant's and Jeffrey Eilers' personal interests were directly effected by the district court's actions. By signing the notice of appeal for BSB they were essentially not representing any interests other then their own.

Due process requires that the court system be accessible to those who are aggrieved. The ridged distinction between a corporation and its owners should be disregarded when that corporation is operated as a de facto sole proprietorship. To allow BSB's sole shareholders to represent their closely held corporation would cause no more disruptions in the court system than courts currently permit to allow individuals to appear pro se. In addition, Tennant and Eilers are not engaged in the unauthorized practice of law in attempting to represent their own corporation because they are neither selling legal services nor holding themselves out as lawyers.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that the decision of the Eighth Circuit be reversed.

Respectfully Submitted,

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APPENDIX

Appendix A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED

SEP, 20 2001

U. S. DISTRICT COURT
EASTERN DISTRICT OF MO
ST. LOUIS

4:01CVO1513SNL

ALLSTATE INSURANCE COMPANY,
Plaintiff,

vs.

BIDDLE STREET BISTRO, INC.,
TLJ COMPANY L.L.C. and,
BREMEN BANK AND TRUST COMPANY,
Defendants.

PLAINTIFF ALLSTATE INSURANCE COMPANY'S COMPLAINT FOR INTER-PLEADER PURSUANT TO RULE 22

Comes now plaintiff, Allstate Insurance Company, and Pursuant to Rule 22, and 28 USC 1332, states as follows:

1. Plaintiff Allstate Insurance Company ("Allstate") is an Illinois Corporation with its principle place of business in Illinois, and for the purposes of jurisdiction is a resident and citizen of the State of Illinois.

2. Defendant Biddle Street Bistro, Inc., ("Biddle Street") is a Missouri Corporation with its principle place of business located in St. Louis, Missouri, and for the purposes of jurisdiction is a resident and citizen of the State of Missouri.

3. TLJ Company L.L.C. ("TLJ") is a Missouri Corporation with its principle place of business in the State of Missouri and for the purposes of jurisdiction, is a resident and citizen of the State of Missouri

4. Bremen Bank and Trust Company ("Bremen") is a Missouri Corporation with its principle place of business in the State of Missouri and for the purposes of jurisdiction, is a resident and citizen of the State of Missouri.

5. Diversity of citizenship exists and that the amount in controversy is in excess of Seventy-Five Thousand Dollars ($75,000.00), exclusive of interest and costs, and jurisdiction is proper pursuant to 28 USC 1332.

6. Allstate issued to Biddle Street a policy of insurance, effective November 10, 2000, through November 10, 2001, policy number 50 343927, which insured Biddle Street for building damage up to a limit of $500,000.00 and insured Biddle Street for personal property damage up to a limit of $100,000.00. A copy of the policy is attached hereto and marked exhibit no. 1.

7. On November 14, 2000, Biddle Street claims a loss covered under the policy occurred and is making a claim against Allstate for proceeds under the policy of insurance.

8. Defendant TLJ, Inc. is identified as a loss payee under the policy of insurance issued by Allstate.

9. Defendant Bremen is identified as the mortgagee in the policy of insurance issued by Allstate. Plaintiff Allstate has deposited into the registry of this court a sum equal to $600,000.00.

11. Biddle Street, TLJ and Bremen have each made claims for proceeds under the policy of insurance issued by Allstate.

12. Biddle' Street's, TLJ's and Bremen's claims are in excess of the limits available under the policy of insurance exposing this plaintiff to double liability.

12. Allstate seeks the court's determination of the allocation of the sums owed to defendants Biddle Street, TLJ and/or Bremen.

WHEREFORE, Allstate prays this court to require defendant to interplead their claims in this court, find and adjudge that plaintiff is a disinterested party in regard to the dispute between defendants, bar all claims against this plaintiff by defendants, apportion the fund between defendants and award plaintiff its attorneys fees and costs related to the filing of this Interpleader action from the funds deposited herein as well as any further relief the court deems just and proper.

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APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JUL 22 2002

U. S. DISTRICT COURT

EASTERN DISTRICT OF MO

Case No. 4:01CV1513

ALLSTATE INSURANCE COMPANY,
Plaintiff,

vs.

BIDDLE STREET BISTRO, INC.,
TLJ COMPANY L.L.C. and,
BREMEN BANK AND TRUST COMPANY,
Defendants.

ORDER

This matter is before the Court on Bremen Bank and Trust Company's motion for summary judgment and TLJ Company, L.L.C.'s motion for summary judgment (#30) filed May 13, 2002. On June 26, 2002, the Court granted the parties' motion to file an incomplete motion package because Biddle Street Bistro, Inc., had not responded to the motion.

Allstate Insurance Company filed this interpleader action on September 20, 2001. It deposited into the Court's registry $500,000 for building coverage and $100,000 for the contents coverage. Allstate was subsequently dismissed from the action. On October 18, 2001, defendant TLJ and defendant Bremen Bank each filed a cross-claim against Biddle Street Bistro. Biddle Street never filed a cross-claim, nor did it file an answer to the cross-claims against it. Biddle Street Bistro was paid $100,000 from the Court's registry which represented the proceeds from the personal property component of the policy because neither TLJ, nor Bremen Bank claimed any interest in the contents coverage.

TLJ and Bremen Bank have both filed motions for summary judgment. TLJ states it is entitled to $100,000 of the building damage proceeds, and Bremen Bank and Trust claims it is entitled to $400,000 of the building damage proceeds. Biddle Street did not file a response, and has not objected to these assertions. The Court has reviewed the summary judgment motions and finds they are with merit.

Accordingly,

IT IS HEREBY ORDERED that Bremen Bank and Trust Company's motion for summary judgment and TLJ Company L.L.C's motion for summary judgment (#30) are **GRANTED.**

IT IS FURTHER ORDERED that judgment is entered in favor of Bremen Bank and Trust Company and TLJ Company, L.L.C., and against Biddle Street Bistro, Inc.

IT IS FURTHER ORDERED that the Clerk of the Court pay $400,000 of the interpleader funds to Bremen. Bank and Trust Company.

IT IS FURTHER ORDERED that the Clerk of the Court pay $100,000 of the interpleader funds to TLJ Company, L.L.C.

IT IS FINALLY ORDERED that this cause of action is dismissed with prejudice.

Dated this 22nd day of July, 2002.

s/_____

SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED
AUG 21 2002

U. S. DISTRICT COURT
EASTERN DISTRICT 0F MO

File No. 4-01CV1513

NOTICE OF APPEAL

ALLSTATE INSURANCE COMPMANY,
Plaintiff,

vs.

BIDDLE STREET BISTRO, INC., TLJ COMPANY and BREMEN BANK AND TRUST COMPANY,

Defendants.

NOTICE OF APPEAL TO A COURT OF APPEALS FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

Notice is hereby given that Biddle Street Bistro, Inc., defendants in the above-named case, hereby appeal to the United States of Court Appeals for the Eighth Circuit from an Order granting defendant Bremen Bank and Trust Company's motion for summary judgment and defendant TLJ Company, LLC's motion for

summary judgment; Order that judgment is entered in favor of Bremen Bank and Trust Company and TLJ Company, LLC; Order that the Court of the Court pay $400,000.00 (Four Hundred Thousand Dollars) of the interplead funds to Bremen Bank and Trust Company; Order that the Court of the Court by $100,000.00 (One Hundred Thousand Dollars) of the interplead funds to TLJ Company, LLC, and the Order dismissing this cause of action with prejudice all of which were entered in this action on the 22nd day of July, 2002. A copy of the Court Order is attached.

"s/ Janet Tennant"

Janet Tennant
400 North 4th Street
St. Louis, Missouri 63102

"s/ Jeff Eilers"

Jeff Eilers
5506 Grace Avenue
St. Louis, Missouri 63116

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed, via first-class United States mail, postage pre-paid, this 21st day of August 2002, to:

Michael B. Maguire
720 Olive Street, Suite 1100
St. Louis, Missouri 63 101

Michael Hunter
10 S. Broadway, Suite 1600
St. Louis, Missouri 63102

s/ Janet Tennant

APPENDIX D

United States Court of Appeals
For the Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102
Michael E, Gans
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

November 18,2002

Ms. Janet Tennant
400 North *4th* Street
#2801
St. Louis, MO

Mr. Jeff Eilers
5506 Grace Avenue
St. Louis, MO 63116

Re: No. 02-3141 *Biddle Street Bistro. Inc. v. TJL Company L.L.C., et al*

Dear Ms. Tennant and Mr. Eilers:

This will acknowledge receipt of your "Reply Brief" in this matter. When we received the Reply Brief, we reviewed the file and noted your attorney, Mr. Dickhaus, was granted leave to withdraw on October 4, 2002. This prompted a review of all of the filings in your appeal, and it appears that you have made all of the filings without benefit of counsel.

While an individual may proceed pro se, a corporation cannot proceed pro se by its shareholders or officers, *U. S. v. Van Shelton* 988 F.2d 70 *(8th* Cir. 1993) and *Cart Enters.* Inc. v United Staten 698 F.2d 952 (8th Cir. 1985). As a result, your notice of appeal, as well as all of your subsequent pleadings, are subject to being stricken and your appeal is subject to being dismissed. While I apologize for the fact that this was not noted earlier, the validity of your notice of appeal is a jurisdictional issue which the court may examine at any time.

As a courtesy to you, I will hold the appeal in abeyance for 30 days to permit you to consult and retain legal counsel and for your attorney to determine whether there is any motion or other legal pleading which could be filed to validate your prior filings.

At the end of this period of time, I will refer the case to the court for a determination as to whether the appeal must be dismissed or should be permitted to proceed.

Sincerely,

"s/ Michael E. Gans"
Michael E. Gans
Clerk of Court

MEG/jpp

cc: Mr. Michael B. Hunter

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeal No. 02-3141

Appeal from the United States District Court
Eastern District of Missouri
Eastern Division

ALLSTATE INSURANCE COMPANY,
Interpleader Plaintiff,

vs.

BIDDLE STREET BISTRO, INC.,
Defendant/Appellant

TLJ COMPANY, L.L.C.
and BREMEN BANK AND TRUST COMPANY,
Defendants/Appelleees.

APPELLANT BIDDLE STREET BISTRO'S MOTION FOR LEAVE TO FILE PLEADINGS AND BRIEFS PREVIOUSLY FILED PRO SE

COMES NOW, Biddle Street Bistro, by and through its attorney of record, and for its motion for leave to file pleadings and briefs previously filed pro se states to the Court as follows:

1. BSB incorporates by reference its motion to submit corrected notice of appeal and adopt pleadings previously filed pro se and its supporting memorandum.

2. Appellant prays for leave to file an Entry of Appearance, Appellant's Form A, Corporate Disclosure Statement, Appellant's Designation of Record, Notice of Method of Preparing the Record on Appeal and Statement of Issues, Appellant's Brief, Appendix and Reply Brief.

3. These pleadings and briefs are identical in form and content to those previously filed on behalf of BSB pro se, with the exception that they are signed by counsel.

4. Appellees will not be prejudiced, and justice requires that Appellant's appeal be decided on its merits.

WHEREFORE, Biddle Street Bistro, prays this Court to allow it to file the above mention pleadings and briefs.

Respectfully Submitted,
BRINKER & DOYEN, L.L.P.

By: s/ Gary P. Paul

Gary P. Paul, #14579
120 South Central Avenue, Suite 700
Clayton, Missouri 63105
(314)-863-6311
(314)-863-8197
ATTORNEY FOR APPELLANT
BIDDLE STREET BISTRO, INC.

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed this 17th day of December, 2002, to Michael B. Hunter, Attorney for Appellees TLJ Company, L.L.C. and Bremen Bank and Trust Company, 10 South Broadway, Suite 1600, St. Louis, Missouri 63102.

s/n _____

Appendix F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ALLSTATE INSURANCE COMPANY,

Interpleader Plaintiff,

vs.

BIDDLE STREET BISTRO, INC.,

Defendant / Appellant

TLJ COMPANY, L.L.C. and
BREMEN BANK AND TRUST COMPANY,

Defendants / Appelleees.

Appeal No. 02-3141

Appeal from the United States District Court
Eastern District of Missouri
Eastern Division

APPELLANT BIDDLE STREET BISTRO'S MOTION TO SUBMIT CORRECTED NOTICE OF APPEAL AND ADOPT PLEADINGS PREVIOUSLY FILED PRO SE

COMES NOW, Biddle Street Bistro, by and through its attorney of record, and for its motion to submit a corrected notice of appeal and adopt the pleadings previously filed in this matter states as follows:

1. On August 21, 2002 Jeff Eilers and Janet Tennant filed a Notice of Appeal with the U.S. District Court for the Eastern District of Missouri as pro se shareholders of their corporation Biddle Street Bistro. This notice was within thirty days of the district court judge's order they wished to appeal. (See Notice of Appeal attached hereto as Exhibit A).

2. At the time of filing, a docket fee of $105.00 was also paid. (See Minutes from the U.S. District Court attached hereto as Exhibit B). Also, at the time of filing, Biddle Street Bistro Inc.'s attorney of record, Karl W. Dickhaus, had not withdrawn his appearance.

3. On August 28, 2002, Ms. Tennant was notified by the Eighth Circuit Clerk that Biddle Street Bistro's Notice of Appeal was received from the Clerk of the United States District Court together with notification of payment of the docket fee. A briefing schedule was attached to this notification. (See Correspondence dated August 28, 2002 attached hereto as Exhibit C).

4. Biddle Street Bistro subsequently filed in a timely fashion the appropriate Entry of Appearance Form and Appeal Information Form. Biddle Street Bistro also filed its Corporate Disclosure Statement, Designation of Record, Notice of Method of Preparing the Record on Appeal and Statement of Issues, and Appellant's Brief in accordance with the filing dates set forth on August 28, 2002. (See BSB's Corporate Disclosure Statement, Designation of Record, Statement of Issues, and Appellant's Brief attached herto as Exhibits D, E, F, and G)

5. Appellees did not contest this Court's jurisdiction, and filed a brief which responded to the merits of Appellant's Brief.

6. On November 18, 2002 the Eighth Circuit Clerk notified Eilers and Tennant that their Reply Brief had been received, but that it was noticed for the first time that they were representing their corporation pro se. The Clerk indicated that a corporation's officers could not represent their corporation, and that since Biddle Street Bistro's Notice of Appeal was not signed by an attorney, this Court may not have jurisdiction. (See Eighth Circuit Court Clerk's Correspondence dated November 18, 2002 attached hereto as Exhibit H).

7. Neighboring Circuits and the United States Supreme Court have ruled that the signature of a notice of appeal is not a jurisdictional matter.

8. Biddle Street Bistro complied with all jurisdictional requirements for a notice of appeal as set forth by the Federal Rules of Appellate Procedure.

9. The undersigned counsel has reviewed all of the pleadings filed on behalf of Biddle Street Bistro, and has found that they meet with all applicable Federal Rules of Appellate Procedure and Local Rules, and wishes to adopt them and their arguments without amendment.

10. Justice requires that Biddle Street Bistro be allowed to substitute counsel and that this Court enter a ruling on the merits of its appeal.

11. Biddle Street Bistro Inc. incorporates by reference its memorandum in support of motion to submit corrected notice of appeal and adopt pleadings previously filed pro se.

WHEREFORE, Biddle Street Bistro, prays this Court to allow it to amend its notice of appeal to be signed by the undersigned counsel, and allow the undersigned

counsel to adopt the pleadings previously submitted pro se by Mr. Eilers and Ms. Tennant.

Respectfully Submitted,
BRINKER & DOYEN, L.L.P.

By: s/_____

Gary P. Paul, #14579
120 South Central Avenue, Suite 700
Clayton, Missouri 63105
(314)-863-6311
(314)-863-8197
Attorney for Appellant Biddle Street Bistro, Inc.

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed this 17th day of December, 2002, to Michael B. Hunter, Attorney for Appellees TLJ Company, L.L.C. and Bremen Bank and Trust Company, 10 South Broadway, Suite 1600, St. Louis, Missouri 63102.

s/_____

Appendix F
Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

FILED
AUG 21 2002
U. S. DISTRICT COURT
EASTERN DISTRICT M0

File No. 4-01CV1513

NOTICE OF APPEAL

ALLSTATE INSURANCE COMPANY,

Plaintiff,

vs.

BIDDLE STREET BISTRO, INC.,
TLJ COMPANY and
BREMEN BANK AND TRUST COMPANY,

Defendants.

NOTICE OF APPEAL TO A COURT OF APPEALS
FROM A JUDGMENT OR ORDER OF
A DISTRICT COURT

Notice is hereby given that Biddle Street Bistro, Inc., defendants in the above-named case, hereby appeal to the United States of Court Appeals for the Eighth Circuit from an Order granting defendant Bremen Bank and Trust Company's motion for summary judgment and defendant TLJ Company, LLC's motion for summary judgment; Order that judgment is entered in favor of Bremen Bank and Trust Company and TLJ Company, LLC; Order that the Court of the Court pay $400,000.00 (Four Hundred Thousand Dollars) of the interplead funds to Bremen Bank and Trust Company; Order that the Court of the Court by $100,000.00 (One Hundred Thousand Dollars) of the interplead funds to TLJ Company, LLC, and the Order dismissing this cause of action with prejudice all of which were entered in this action on the 22w' day of July, 2002. A copy of the Court Order is attached.

s/_____
Janet Tennant
400 North 4th Street
St. Louis, Missouri 63102

s/_____
Jeff Eilers
5506 Grace Avenue
St. Louis, Missouri 63116

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed, via first-class United States mail, postage pre-paid, this 21st day of August 2002, to:

Michael B. Maguire
720 Olive Street, Suite 1100
St. Louis, Missouri 63101

Michael Hunter
10 S. Broadway, Suite 1600
St. Louis, Missouri 63102

s/_____

Appendix F
Exhibit B

U.S. District Court

Eastern District of Missouri (Eastern)

CIVIL DOCKET FOR CASE #: O1-CV-1513

Allstate Insurance v. Biddle Street Bistro, et al

Filed: 09/20/01
Assigned to: Honorable Stephen N. Limbaugh
Demand: $75,000
Nature of Suit: 110
Lead Docket: None
Jurisdiction: Diversity
Dkt# in other court: None
Cause: 28:1332 Diversity-Insurance Contract

ALLSTATE INSURANCE COMPANY
plaintiff
[term 02/27/02]

Michael B. Maguire
[term 02/27/02
314-421-3128 fax
[COR LD NTC]
BROWN AND JAMES, P.C.
1010 Market Street
20th Floor
St. Louis, MO 63101
314-421-3400
FTS 421-3128

David W. Laws
[term 02/27/021
314-726-2360 fax
[COR LD NTC]
BOGGS AND BOGGS, LLC
7912 Bonhomme Avenue
Suite 400
Clayton, MO 63105
314-726-2310
FTS 726-2360

v.

BIDDLE STREET BISTRO, INC.
defendant

Karl W. Dickhaus
314-962-5083 fax
[COR LD NTCI
1750 S. Brentwood Boulevard
Suite 201
St. Louis, MO 63144
314-962-9000
FTS 962-5083

TLJ COMPANY L.L.C.
defendant

Michael B. Hunter
314-345-5055 fax
[COR LD NTC]
WILLIAMS AND VENKER
Ten South Broadway
Suite 1600
St. Louis, MO 63102-2740
314-345-5000
FTS 345-5055

BREMEN BANK AND TRUST COMPANY
defendant

Michael B. Hunter
(See above)
[COR LD NTC]

TLJ COMPANY L.L.C.
cross-claimant

Michael B. Hunter
314-345-5055 fax
[COR LD NTC]
WILLIAMS AND VENKER
Ten South Broadway
Suite 1600
St. Louis, MO 63102-2740
314-345-5000
FTS 345-5055

V.
BIDDLE STREET BISTRO, INC.
cross-defendant

Karl W. Dickhaus
314-962-5083 fax
[COR LD NTC]
1750 S. Brentwood Boulevard
Suite 201
St. Louis, NO 63144
314-962-9000
FTS 962-5083

BREMEN BANK AND TRUST COMPANY
cross-claimant

314-345-5055 fax
[COR LD NTCJ
WILLIAMS AND VENKER
Ten South Broadway
Suite 1600
St. Louis, MO 63102-2740
314-345-5000
F'TS 345-5055

V.
BIDDLE STREET BISTRO, INC.
cross-defendant

314-962-5083 fax
[COR LD NTC}
1750 S. Brentwood Boulevard
Suite 201
St. Louis, MO 63144
314-962-9000
FTS 962-5083

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
6/24/02	32	MOTION by defendant TLJ Company L.L.C., defendant Bremen Bank & Trust for leave to file incomplete motion package (kxs) [Entry date 06/25/02]
6/26/02	33	RULED DOCUMENT by Honorable Stephen N. Limbaugh granting motion for leave to file incomplete motion package [32-1] LEAVE GRANTED (cc: all counsel) (kxs) [Entry date 06/26/02]
7/22/02	34	ORDER by Honorable Stephen N. Limbaugh IT IS HEREBY ORDERED that Bremen Bank and Trust Company's motion for summary judgment and TLJ Company L.L.C's motion for summary judgment are GRANTED. IT IS FURTHER ORDERED that judgment is entered in favor of Bremen Bank and Trust Company and TLJ Company, L.L.D., and against Biddle Street Bistro, Ic. IT IS FURTHER ORDERED that the Clerk of the Court pay $400,000 of the interpleader funds to Bremen Bank and Trust Company [30-1] [30-1], IT IS FURTHER ORDERED that the Clerk of the Court pay $100,00 of the interpleader funds to TLJ Company, L.L.C. IT IS FINALLY ORDERED that this cause of action is dismissed with prejudice. [30-1] [30-1]

		dismissing case (cc: all counsel) (arl) [Entry date 07/22/02]
8,'21/02	35	MOTION by defendant Biddle Street Bistro to set aside judgment and relief from judgment or order w/memo in support. (lah) [Entry date 08/21/02]
8/21/02	36	NOTICE OF APPEAL filed by defendant Biddle Street Bistro re: the District Court decision ; [34-2] fee: $105.00 (lah) [Entry date 08/21/02]
8/21/02	37	RECEIPT # S2002-009299 in the amount of $105.00 for appeal (lah) [Entry date 08/21/02]

Appendix F
Exhibit C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THOMAS F. EAGLETON COURT HOUSE
ROOM 24.329
111 S. 10TH STREET
ST. LOUIS, MISSOURI 83102

MICHAEL E. GANS
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

August 28, 2002

Ms. Janet Tennant
400 N. Fourth Street
St. Louis, MD 63102

Re: 023141 Riddle Street Bistro vs. TLJ Company

Dear Counsel:

We have received certified copies of the notice of appeal and docket entries from the Clerk of the United States District Court, together with notification of payment of the docket fee. In accordance with the Federal Rules of Appellate Procedure and the Eighth Circuit Rules, this appeal has today been assigned the docket number indicated.

The clerk's office provides a number of practice aids and materials to assist you in preparing the record and briefs. You can download the materials from our website

at www.ca8.uscourts.gov/newcoa/coaFranie.htrnl The material is provided to assist counsel in the preparation and filing of :he record and briefs. Counsel for both sides must familiarize themselves with the material and iamediately confer regarding the briefing schedule and record requirements (Eighth Circuit Rule 30A). Within ten days of the date of this letter appellant must file with this office (1) verification that the transcript arrangements have been satisfactorily completed and (2) notification of the method of preparation of the appendix jointly selected by counsel. Appeals in which the appendix and opening brief are not timely filed axe subject to dismissal pursuant to Eighth Circuit Rule 3C; cases in which appellees do not timely file a brief axe governed by FRAP Rule 31(c).

Multiple appellants or appellees who axe jointly represented by a single attorney shall file one brief. Multiple appellants or apellees who are separately represented may file separate briefs ox a joint brief. A party responding to multiple briefs from separately-represented parties shall file a single responsive or reply brief. (5052-010199)

Sincerely,

/s_____
Michael E. Gans
Clerk of Court

11b Enclosure(s)
cc: Jeff Eilers
Karl. W. Dickhaus
Michael B. Hunter
James 0. Woodward, Clerk
District Court/Agency Case Number(s): 4:O1-cv-1513 (SNL)

August 28, 2002
Case Number: O2341

District Court/Agency Case Number(s):
4:O1..cv-1513 (SL)

ALLSTATE INSURANCE COMPANY
Plaintiff

V.

BIDDLE STREET BISTRO, INC.;
Defendant - Appellant

TLJ COMPANY, L L .C.:
BREMEN BANK AND TRUST COMPANY
Defendants - Appellees

(5072-010199)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPEAL BRIEFING SCHEDULE

Appeal No. *02-3141*

Biddle Street Bistro v TLJ Company

Date: August 28, 2002

This schedule has been established in conformity with 8th Cir. R. 28A & 30A, which is a modification of the procedure suggested in FRAP. Because this court has directed that the practice of routinely granting extensions of time be discontinued counsel and court personnel must carefully note the dates indicated and arrange their schedule to insure compliance with this order.

APPEAL REQUIREMENTS

Complete and file immediately:

a. Appeal Information Form. 8th Cit. R. 3B

b. Corporate Disclosure Statement. 8th Cir. R. 26.1

c. The enclosed Entry of Appearance Form,

NOTE: These dates may be advanced or extended by court order or a party's early or late filing of a brief. Please refer to FRA 31(a).

FILING DATES:

Method of Appendix Preparation Notification	9/9/02
Designation of record & Statement of issues-Appellant	919/02
Designation of Record-Appellee	9/11/02
Transcript	N/A
Appendix (3 copies)	10/7/02
Brief-Appellant with Addendum Brief-Appellee	11/6/02
Reply Brief (optional)	11/20/02

ALL BRIEFS AND APPENDICES SHOULD BE FILED WITH THE ST. LOUIS OFFICE

(5107-010199)

Appendix F
Exhibit D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ALLSTATE INSURANCE COMPANY,
Plaintiff,

vs.

BIDDLE STREET BISTRO, [NC..
Defendant / Appellant

TLJ COMPANY, L.L.C.
and BREMEN BANK AND TRUST COMPANY,
Defendants / Appellees.

Case No.: 02-3141

CORPORATE DISCLOSURE STATEMENT

COMES NOW Appellant, Biddle Street Bistro, Inc., and pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule of Appellate Procedure 26.1 A states as follows:

1. The parent companies of the corporation: None.
2. Subsidiaries not wholly owned by the corporation: none.

3. Any publicly held company that owns ten percent or more of the corporation's stock: none.

/s_____
Janet Tennant
400 North 4th Street, 42801
St. Louis, Missouri 63102
314-780-0953
Pro Se Shareholder

/s_____
Jeff Eilers
5506 Grace Avenue
St. Louis, Missouri 63116
314-580-6729
Pro Se Shareholder

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed, via first-class United States mail, postage pre-paid, this _____ day of September 2002, to:

Michael Hunter
10 S. Broadway, Suite 1600
St. Louis, Missouri 63102

/s_____

Appendix F
Exhibit E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ALLSTATE INSURANCE COMPANY,
Plaintiff,

vs.

BIDDLE STREET BISTRO, INC.,
Defendant / Appellant

TLJ COMPANY, L.L.C.
and BREMEN BANK AND TRUST COMPANY,
Defendants / Appellees.

Case No.: 02-3141

APPELLANT'S DESIGNATION OF RECORD

COMES NOW Appellant, Biddle Street Bistro, Inc. and pursuant to FRAP 30(b)(1) designates that the following parts of the record will be included in its appendix.

1. Complaint;
2. Order by Judge Donald J. Stohr entered on September 24, 2001;

3. Answer by defendant Biddle Street Bistro, Inc. to [1-1] plaintiff's complaint;

4. Answer by defendant TLJ Company L.L.C. to [1-1];

5. Answer by defendant Bremen Bank and Trust to [1-1];

6. Crossclaim by defendant TLJ Company, L.L.C. against defendant Biddle Street Bistro for Declaratory Judgment;

7. Crossclaim by defendant Bremen Bank and Trust against defendant Biddle Street Bistro for Declaratory Judgment;

8. Order and Judgment by Judge Stephen N. Limbaugh entered February 27, 2002;

9. Order and Judgment by Judge Stephen Limbaugh entered on April 22, 2002;

10. Order and Judgment by Judge Stephen N. Limbaugh entered April 29, 200

11. Order by Judge Stephen N. Limbaugh entered on May 7, 2002;

12. Motion by defendant Bremen Bank and Trust for summary judgment with memo in support, statement of facts, and exhibits A through L attached;

13. Motion by defendant TLJ Company L.L.C. for summary judgment with memo in support, statement of facts, and exhibits A through L attached;

14. Motion by defendant TLJ Company L.L.C. defendant Bremen Bank and Trust for leave to file incomplete motion package;

15. Ruled Document by Judge Stephen N. Limbaugh granting motion for leave to file incomplete motion package;

16. Order by Judge Stephen N. Limbaugh entered on July 22, 2002;

17. Motion by defendant Biddle Street Bistro to set aside judgment and relief from judgment or order with memo in support;

18. Notice of Appeal filed by defendant Biddle Street Bistro regarding the District Court decision.

Janet Tennant
400 North 4th Street, #2801
St. Louis, Missouri 63102
314-780-0953
Pro Se Shareholder

Jeff Eilers
5506 Grace Avenue
St. Louis, Missouri 63116
314-580-6729
Pro Se Shareholder

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed, via first-class United States mail, postage pre-paid, this _____ day of September 2002, to:

Michael Hunter
10 S. Broadway, Suite 1600
St. Louis, Missouri 63102

s/_____

Appendix F
Exhibit F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ALLSTATE INSURANCE COMPANY,
Plaintiff,

vs.

BIDDLE STREET BISTRO, INC.,
Defendant / Appellant

TLJ COMPANY, L.L.C.
and BREMEN BANK AND TRUST COMPANY,
Defendants / Appellees.

Case No.: 02-3141

NOTICE OF METHOD OF PREPARING THE RECORD ON APPEAL AND STATEMENT OF ISSUES

COMES NOW Appellant, Biddle Street Bistro, Inc., and pursuant to Eighth Circuit Rule of Appellate Procedure 30 A(b) notifies the Court and opposing parties of its method of preparing record on appeal:

1. Appellants will dispense with the process of preparing a joint appendix as set forth in Federal Rule of Appellate Procedure 30(a) and (b) and submit a separate appendix with the opening brief.

2. There is no transcript.

3. The Issues presented to this Court are whether the District Court erred in granting TLJ Company, L.L.C.'s motion for summary judgment and Bremen Bank and Trust Company's motion for summary judgment.

s/_____
Janet Tennant
400 North 4th Street, p2801
St. Louis, Missouri 63 102
314-780-0953
Pro Se Shareholder

s/_____
Jeff Eilers
5506 Grace Avenue
St. Louis, Missouri 63116
314-580-6729
Pro Se Shareholder

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed, via first-class United States mail, postage pre-paid, this ____ day of September 2002, to:

Michael Hunter
10 S. Broadway, Suite 1600
St. Louis, Missouri 63102

s/_____

Appendix F
Exhibit G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeal No. 02-3141

ALLSTATE INSURANCE COMPANY,
Interpleader Plaintiff

v.

BIDDLE STREET BISTRO, INC.
Defendant / Appellant

TLJ COMPANY, L.L.C. and
BREMEN BANK AND TRUST COMPANY,
Defendants / Appellees.

Appeal from the United States District Court
Eastern District of Missouri
Eastern Division

The Honorable Stephen N. Limbaugh,
Senior United States District Judge

BRIEF OF APPELLANT BIDDLE STREET BISTRO INC.

Janet Tennant
400 North 4th Street, #2801
St. Louis, Missouri 63102
314/780-0953
Fax: 314/241-2330
Pro Se Shareholder for Appellant

Jeff Eilers
5506 Grace Avenue
St. Louis, Missouri 63116
314/580-6729
Pro Se Shareholder for Appellant

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Allstate Insurance Company (hereafter Allstate) interpleaded the funds of a premises liability insurance policy. (App 1-3)[1]. The named insured, owner of the property, and mortgagee were named as co-defendants. Biddle Street Bistro (hereafter BSB) occupied the destroyed premises and was the named insured of the policy. (App. 67). TLJ Company, Inc. (hereafter TLJ) was the owner of the property, and Bremen Bank and Trust Company, L.L.C. (hereafter Bremen) was the mortgagee of the property. BSB, TLJ and Bremen each made a claim to the insurance proceeds. (App. 12-15, 16-18, 19-21).

The district court granted BSB's motion for partial summary judgment and awarded it the entire policy limits for the personal property coverage. (App. 6-8).

---

[1] Appellant's separate appendix will be referred to as "App."

The district court then granted TLJ's and Bremen's motions for summary judgment concerning the policy limits for the building damage. (App. 9-11).

BSB was unable to communicate with their attorney of record, and was not aware of TLJ's or Bremen's motions and the district court's order granting their motions until August 20, 2002. (App. 391-394). BSB then timely filed its notice of appeal. (App. 399-402).

Appellant requests 15 minutes of oral argument.

CORPORATE DISCLOSURE STATEMENT

Biddle Street Bistro, Inc. has no parent companies or subsidiaries not wholly owned by the corporation. No publicly held company owns ten percent or more of the corporation's stock.

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Robert Johnson Grain Co. v Chem. Interchange Co., 541 F.2d 207, 210 (8th Cir. 1983) 15

United Tel Co. V Johnson Publishing Co., 855 F. 2d 604 (8th Cir. 1988) 7,14

Wilmurth v National Liberty Ins Co. of America et al., 206 S.W.2d 730 (Mo.App. 1947) 7, 13, 18

Wrausmann v. Kansas City Fire and Marine Ins. Co., 477 S.W.2d 741, 743 (Mo.App. 1972) 17

Statutes

28LJ.S.C. 1332 6

28 U.S.C. 1292 6

20 U.S.C. 41 6

Other Authorities

Federal Rule of Appellate Procedure #4 6

Federal Rule of Civil Procedure #56 15

JURISDICTIONAL STATEMENT

On or about September 20, 2001 Allstate filed an interpleader action in the United States District Court, Eastern District of Missouri. Allstate invoked the district court's jurisdiction pursuant to 28 U.S.C. 1332. (App. 1-3).

The district court ordered Allstate to deposit into its registry payment of $500,000 for the building coverage and $100,000 for the contents coverage, the limit of liability under Allstate's policy of insurance. (App. 4).

On or about April 29, 2002 the district court entered judgment in favor of BSB in the amount of $100,000 on its partial motion for summary judgment for policy limits of the Allstate policy's contents coverage. (App. 6-8).

On or about July 22, 2002 the district court granted Bremen's motion for summary judgment and TLJ's motion for summary judgment for the $500,000 of building coverage. The district court also entered judgment in favor of Bremen and TLJ, and against BSB. The district court then ordered that the cause of action be dismissed with prejudice. (App. 9-11).

Notice of Appeal was timely filed on August, 21, 2002. FRAP 4. The Court has jurisdiction as the district court's ruling on TLJ's and Bremen's motions for summary judgment is a final order that disposes of all parties' claims. 28 U.S.C. 1291. The United States District Court, Eastern District of Missouri is within the territory of the Eighth Circuit Court of Appeals. 20 U.S.C. 41.

STATEMENT OF THE ISSUES

THE DISTRICT COURT ERRED IN GRANTING TLJ'S AND BREMEN'S MOTIONS FOR SUMMARY JUDGMENT BECAUSE TLJ AND BREMEN WERE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THERE WERE GENUINE AND MATERIAL ISSUES OF FACT WHICH PRECLUDED SUMMARY JUDGMENT IN THAT:

A.

THE RECORD BEFORE THE DISTRICT COURT CONTAINED SUFFICIENT FACTS TO DEMONSTATE THAT BSB HAD AN INSURABLE INTEREST IN THE BUILDING ON 220 BIDDLE STREET, AND

B.

THE RECORD BEFORE THE DISTRICT COURT CONTAINED SUFFICIENT FACTS TO DEMONSTRATE THAT TLJ AND BREMEN HAD NO CLAIM TO THE ALLSTATE INSURANCE POLICY BECAUSE IT WAS NOT THE INTENT OF THE PARTIES TO THAT POLICY TO INSURE TLJ'S AND BREMEN'S INTERESTS IN THE BUILDING ON 220 BIDDLE STREET.

Wilmurth v. National Liberty Ins Co. of America et al., 206 S.W.2d 730 (Mo.App. 1947)

Puritan Insurance Company v Yarber, 723 S.W.2d 98 (Mo.App. 1987)

G.M. Battery & Boat Co. v L.K.N Corp., 747 S.W.2d 624 (Mo banc 1988)

United Tel Co. V Johnson Publishing Co., 855 F. 2d 604 (8th Cir. 1988)

STATEMENT OF THE CASE

The case out of which the present appeal arises was an interpleader action brought by Allstate. (App. 1-3). Allstate issued a policy of fire insurance to BSB which listed BSB as the only named insured, and carried coverage up to a limit of $500,000 for building damage, and up to $100,000 for personal property damage. (App. 2). Unknown to BSB, TLJ and Bremen were listed as loss payees on its policy of insurance. (App. 68 and 129).

The district court awarded the entire $100,000 for personal property damage to BSB. (App. 6-8). The district court then granted TLJ's and Bremen's motions for summary judgment, and awarded the entire amount of the $500,000 policy for building damage to TLJ and Bremen. (App. 9-11). BSB was unaware of TLJ's and Bremen's motions for summary judgment and the district court's order granting them until August 20, 2002. BSB then filed its Rule 60(b) motion and notice of appeal in a timely fashion. (App. 389-398, and 399-402).

STATEMENT OF FACTS

BSB, operating under the name J. Tennant Construction, once owned property located at 220 Biddle Street, St. Louis, Missouri, and was running a bistro called "J's on the Landing." (App. 304-305). In 1997 due to financial difficulties it entered into an agreement with T.L.J. (App. 305). BSB transferred the deed on 220 Biddle Street to TLJ in exchange for a commercial lease with an option to re-purchase the property within two years. (App. 305 and 315-329).

BSB exercised the purchase option on January 29, 1999 by a Notice of Exercise to Option to Purchase Real Estate. (App. 305 and 330). BSB was ready to close on the option date of May 29, 1999 at the purchase price

called for in the 1997 option. (App. 305). TLJ contacted BSB prior to said closing and offered to renew the financing on the property subject to the terms and conditions of a Sales Contract dated June 18, 1999. (App. 305). As a condition precedent to the execution of the Sales Contract, BSB requested that TLJ's offer to extend the terms of the contract if closing could not be accomplished in six months be included. (App. 306). The specific language of that provision being: "In the event Buyer is unable to close on or before October 28, 1999, Seller agrees to enter into another Sales Contract along terms similar to this one except the sale price and other monetary amounts will be agreed upon by the parties at the time the new contract is executed." (App. 306 and 333).

BSB was unable to close by October 28, 1999, and TLJ refused to exercise another sales contract. (App. 306-307). BSB then sued TLJ in the Circuit Court for the City of St. Louis to enforce TLJ's promise of an extension of the October 29, 1999 agreement. (App. 304-311). TLJ was granted leave to file a counter claim for ejectment. (App. 257). BSB's suit was pending on November 14, 2000 when the property at 220 Biddle Street was destroyed by fire. Since the property was lost, the state court judge entered judgment in favor of TLJ's ejectment claim as a matter of law. (App. 234).

The property loss was covered by a premises liability insurance policy written by Allstate, policy number 50 343927. (App. 2). That policy was purchased by BSB, and BSB was the sole named insured. (App. 67). Pursuant to its lease agreement, BSB initially named Bremen and TLJ as loss payees. (App. 344). When TLJ refused to honor its agreement to grant an extension, BSB contacted its insurance broker to request that TLJ and Bremen be removed from their policy as loss payees.

(App. 368). BSB's request was honored by Allstate. (App. 380). When TLJ found out that it was no longer a loss payee on BSB's policy, it called BSB's agent and demanded to be put back on. (App. 141). The agent complied. (App. 156).

BSB, TLJ and Bremen all made claims for the insurance proceeds. Allstate Insurance Company filed an interpleader action in the United States District Court, Eastern District of Missouri. (App. 1-3). The district court granted BSB's motion for partial summary judgment and awarded it the entire policy limits for the personal property coverage. (App. 6-8). After it's motion for partial summary judgment was granted, BSB was unable to contact its attorney. (App. 392-395). Unknown to BSB, TLJ and Bremen had filed motions for summary judgment on the policy coverage for the building. (App. 392-395). The district court granted TLJ's and Bremen's motions for summary judgment concerning the policy limits for the building damage. (App. 9-11).

SUMMARY OF THE ARGUMENT

The district court erred by granting TLJ's and Bremen's motions for summary judgment because they were not entitled to judgment as a matter of law. Material facts were before the district court which showed that BSB had an insurable interest in the building, and material facts were before the district court which showed that TLJ's and Bremen's interests were not intended to be insured by the Allstate policy in question.

Facts were present in the district court's record sufficient to have allowed BSB to show the pecuniary interest needed to assert an insurable interest. The definition of an insurable interest was summarized in

G.M. Battery & Boat Co. v L.K.N Corp., 747 S.W.2d 624, 627 (Mo banc 1988):

> In general, a person has an insurable interest in the subject matter insured where he has such a relation or concern in such subject matter that he will derive pecuniary benefit or advantage from its preservation, or will suffer pecuniary loss or damage from its destruction, termination, or injury by the happening of the event insured against.

TLJ and Bremen base their claim to the building damage proceeds of BSB's insurance policy on the fact that they were listed as named payees or mortgagees on the policy. (App. 43-45 and 409-411). The district court's record clearly indicates that BSB, the named insured, did not intend to insure their interests. (App. 42, 141, 368 and 380). TLJ was the owner of the building and Bremen was mortgagee; however, a property insurance contract does not run with the property unless expressly stipulated. *Puritan Insurance Company v Yarber,* 723 S.W.2d 98, 102 (Mo.App. 1987). An insurance policy is a personal contract between the insurer and the insured. *Wilmurth v National Liberty Ins Co. of America et al.,* 206 S.W.2d 730, 733 (Mo.App. 1947). Accordingly, there must be proof that the terms of the policy allowed TLJ and Bremen to request to be named payees without the consent or knowledge of the named insured, and no such showing was made.

ARGUMENT

THE DISTRICT COURT ERRED IN GRANTING TLJ'S AND BREMEN'S MOTIONS FOR SUMMARY JUDGMENT BECAUSE TLJ AND BREMEN WERE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THERE WERE GENUINE AND MATERIAL ISSUES OF FACT WHICH PRECLUDED SUMMARY JUDGMENT IN THAT:

A.

THE RECORD BEFORE THE DISTRICT COURT CONTAINED SUFFICIENT FACTS TO DEMONSTRATE THAT BSB HAD AN INSURABLE INTEREST IN THE BUILDING ON 220 BIDDLE STREET, AND

B.

THE RECORD BEFORE THE DISTRICT COURT CONTAINED SUFFICIENT FACTS TO DEMONSTRATE THAT TLJ AND BREMEN HAD NO CLAIM TO THE ALLSTATE INSURANCE POLICY BECAUSE IT WAS NOT THE INTENT OF THE PARTIES TO THAT POLICY TO INSURE TLJ'S AND BREMEN'S INTEREST IN THE BUILDING ON 220 BIDDLE STREET.

A. Standard of Review

The Court reviews de novo a district court's order granting summary judgment, using the same standards as the district court. *Get Away Club Inc. v. Coleman* 969 F.2d 664, 666 (8th Cir. 1992). On appellate review of a decision to grant summary judgment, the court applies the same standard applied by the district court. *United Tel Co. v. Johnson Publishing Co.*,

855 F.2d 604, 607 (8th Cir. 1988). Summary judgment is to be granted only if there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. Id. In passing on a motion for summary judgment, the court must review the facts in a light most favorable to the party opposing the motion and give that party the benefit of any inferences that logically can be drawn from those facts. *Buller v. Buechler,* 706 F.2d 844, 846 (8th Cir. 1983). The court is required to resolve all conflicts of evidence in favor of the nonmoving party. *Robert Johnson Grain Co. v. Chem. Interchange Co.,* 541 F.2d 207, 210 (8th Cir. 1983). According to Federal Rule of Civil Procedure 56(e) BSB was not required to file a response to TLJ's and Bremen's motions for summary judgment to preserve their right to appeal. Rule 56(e) states if the opposing party fails to respond to a motion for summary judgment, the court shall only enter judgment against him "if appropriate."

B. Applicable Law

This matter was before the district court by exercise of diversity jurisdiction. Accordingly, this Court should apply the substantive law of the State of Missouri. *R.M. Taylor Inc. v General Motors Corp.,* 187 F.3d 809, 812 (8th Cir. 1999).

C. Discussion

i. Material facts exist which show Biddle Street Bistro's insurable interest

Material facts in the record below indicate that BSB had an insurable interest in the property damage portion of the Allstate policy. In TLJ's and Bremen's memorandum in support of their motions for summary judgment, they assert that summary judgment is ap-

propriate because BSB had no insurable interests. (App. 41-47 and 411-413). They state that BSB admitted that it had no insurable interest, and that it never intended to make a claim on the building damage portion of the Allstate policy. (App. 43 and 409). They further assert that BSB had no insurable interest because it had no ownership interest in the destroyed property. (App. 45-46 and 411-413).

A thorough review of the record reveals that BSB asserted a building damage claim. In its Answer to Allstate's Complaint, BSB admits that it made a claim on the policy benefits for both personal property and damage to the building. (App. 13). Similarly, in their Answers, both TLJ and Bremen admit that all three co-defendants made claims on all applicable insurance policies. (App. 16-21). Further, in its answer to TLJ's requests for admissions, BSB specifically denied that it had no insurable interest in the destroyed building. (App. 386).

It would be an error if the district court relied upon the fact that Biddle Street Bistro could point to no ownership interest in the destroyed property for the conclusion that it could have no insurable interest. Missouri law consistently refuses to link ownership with an insurable interest.[2] Missouri courts make every effort to find insurable interest, and to sustain coverage, when there is any substantial possibility that the insured will suffer loss from the destruction of the property. *G.M. Battery & Boat Co. v L.K.N Corp.*,

---

[2] See e.g., *M.F.A. Mut. Ins Co. v Gulf Ins Co.*, 445 S.W.2d 829 (Mo. 1969) (a building contractor has an insurable interest in an uncompleted house he was required to complete); *Graves v Stanton*, 621 S.W.2d 524 (Mo.App. 1981) (a lessee of a trailer who had no option to purchase had an insurable interest in the liability insurance policy it took out).

747 S.W.2d 624, 627 (Mo banc 1988). The Missouri Supreme Court in that case went on to state that the controlling rule in Missouri is as follows:

> In general, a person has an insurable interest in the subject matter insured where he has such a relation or concern in such subject matter that he will derive pecuniary benefit or advantage from its preservation, or will suffer pecuniary loss or damage from its destruction, termination, or injury by happening of the event insured against. Id. at 626 quoting *Wrausmann v Kansas City Fire and Marine Ins Co.*, 477 S.W.2d 741, 743 (Mo.App. 1972).

The Missouri Supreme Court went on to hold that the fact that a lessee had not exercised its option to purchase at the time of the loss had no bearing on whether that lessee had an insurable interest. Id. at 627.

There were many facts at the district court's disposal that indicate Biddle Street Bistro had a pecuniary interest in the destroyed property. At the time of the loss and when it entered into the insurance contract, it was in the possession of the destroyed property. (App. 140 and 309). In the year preceding the loss, it was engaged in litigation to protect and define its interest. (App. 304-311). At the time of the loss, BSB was attempting to require specific performance of a contract which would allow it to buy back the destroyed property which it had previously owned so it could continue operation of its business. (App. 304-311).

The record below also showed that BSB would have derived pecuniary benefit from the building's preservation. Since 1997 BSB ran a bistro on the premises and expended significant sums of money and labor in developing good will in that location. (App. 304-311). BSB also made many material improvements to the de-

stroyed building from which it was deprived. (App. 304-311).

ii. Material facts exist which question TLJ and Bremen's right to benefits under the Allstate policy

There is no indication in the record below that any entity other than BSB ever paid to insure the building at 220 Biddle Street. It is also uncontested that BSB requested that TLJ and Bremen be removed as payees, and that the policy was amended to reflect their wish. (App. 42, 141, 368 and 380). Upon notification of the policy change, neither TLJ nor Bremen requested BSB to replace them as loss payees or mortgagees. There is nothing in the record which indicates that either defendant attempted to protect their interests by taking out another property insurance policy. Instead, a representative of TLJ went behind Biddle Street Bistro's back and requested BSB's insurance agent to put TLJ and Bremen back on BSB's policy. (App. 141).

An insurance policy is a personal contract between the insurer and insured. *Wilmurth v National Liberty Ins Co. of America et al,* 206 S.W.2d 730, 733 (Mo.App. 1947). A property insurance contract does not run with the property unless expressly stipulated. *Puritan Insurance Co v Yarber,,* 723 S.W.2d 98, 102 (Mo.App. 1987). One who is not named as an insured cannot have the benefit of insurance, unless there is language in the policy to show that it intended to cover said interest. *Id.*

TL's and Bremen's sole claim to the property damage proceeds of BSB's insurance policy is that their request to be put back on BSB's policy was granted. The district court erred by granting their claims to the policy proceeds based upon this fact alone. It was never suggested that BSB had a contractual obligation to include them

on its policy as named insureds. TLJ and Bremen do not suggest that they attempted to pay for the policy. They simply assert that they requested BSB's agent to put them on BSB's policy, and the agent did so. They do not even suggest that BSB was aware that they were put back on its policy. There are no provisions in BSB's insurance contract with Allstate which would authorize any entity other than the named insured to designate named payees or mortgagees. The only indication of the named insured's intent in the district court's record is that it specifically did not want TLJ's and Bremen's interests protected by its policy. (App. 368, 370 and 380).

Without a showing that the Allstate policy permitted amendments to its terms by an entity other than BSB or Allstate, it is impossible to argue that an amendment to the policy made at the request of an entity other than Allstate or BSB reflects the intent of the policy, in addition, awarding TLJ and Bremen the benefits of a policy of insurance for which they did not pay would be an unjust enrichment.

CONCLUSION

BSB respectfully requests this Court to reverse the district court's order granting TLJ's and Bermen's motions for summary judgment and remand the case for further proceedings.

s/_____
Janet Tennant
400 North 4th Street, #2801
St. Louis, Missouri 63102
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Fax: 314/241-2330
Pro Se Shareholder for Appellant

s/_____
Jeff Eilers
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314/580-6729
Pro Se Shareholder for Appellant

ADDENDUM

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ALLSTATE INSURANCE COMPANY,
Plaintiff,

vs.

BIDDLE STREET BISTRO, INC.,
TLJ COMPANY L.L.C. and,
BREMEN BANK AND TRUST COMPANY,
Defendants.

Case No. 4:01CV1513

FILED
JUL 22 2002
U. S. DISTRICT COURT
EASTERN DISTRICT OF MO

ORDER

This matter is before the Court on Bremen Bank and Trust Company's motion for summary judgment and TLJ Company, L.L.C.'s motion for summary judgment (#30) filed May 13, 2002. On June 26, 2002, the Court granted the parties' motion to file an incomplete motion package because Biddle Street Bistro, Inc., had not responded to the motion.

Allstate Insurance Company filed this interpleader action on September 20, 2001. It deposited into the Court's registry $500,000 for building coverage and $100,000 for the contents coverage. Allstate was subse-

quently dismissed from the action. On October 18, 2001, defendant TLJ and defendant Bremen Bank each filed a cross-claim against Biddle Street Bistro. Biddle Street never filed a cross-claim, nor did it file an answer to the cross-claims against it. Biddle Street Bistro was paid $100,000 from the Court's registry which represented the proceeds from the personal property component of the policy because neither TLJ, nor Bremen Bank claimed any interest in the contents coverage.

TLJ and Bremen Bank have both filed motions for summary judgment. TLJ states it is entitled to $100,000 of the building damage proceeds, and Bremen Bank and Trust claims it is entitled to $400,000 of the building damage proceeds. Biddle Street did not file a response, and has not objected to these assertions. The Court has reviewed the summary judgment motions and finds they are with merit.

Accordingly,

IT IS HEREBY ORDERED that Bremen Bank and Trust Company's motion for summary judgment and TLJ Company L.L.C's motion for summary judgment (#30) are **GRANTED**.

IT IS FURTHER ORDERED that judgment is entered in favor of Bremen Bank and Trust Company and TLJ Company, L.L.C., and against Biddle Street Bistro, Inc.

IT IS FURTHER ORDERED that the Clerk of the Court pay $400,000 of the interpleader funds to Bremen. Bank and Trust Company.

IT IS FURTHER ORDERED that the Clerk of the Court pay $100,000 of the interpleader funds to TLJ Company, L.L.C.

IT IS FINALLY ORDERED that this cause of action is dismissed with prejudice.

Dated this 22nd day of July, 2002.

s/_____
SENIOR UNITED STATES
DISTRICT JUDGE

AN ORDER, JUDGMENT OR ENDORSEMENT WAS SCANNED, FAXED AND/OR MAILED TO THE FOLLOWING INDIVIDUALS ON 07/22/02 by aluisett

4:01cv1513 Allstate Insurance vs Biddle Street Bistro

28:1332 Diversity-Insurance Contract

Karl Dickhaus -	80043	Fax: 314-962-5083
Michael Hunter -	70351	Fax: 314-345-5055

SCANNED & FAXED BY:
JULY 22 2002

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ALLSTATE INSURANCE COMPANY
Plaintiff

vs.

BIDDLE STREET BISTRO, INC.,
TLJ COMPANY, L.L.C. and
BREMEN BANK AND TRUST COMPANY
Defendants.

FILED
APR 29 2002
U. S. DISTRICT COURT
EASTERN DISTRICT OF MO
Case No.4:01CV01513 SNL

ORDER AND JUDGMENT

Before the Court appears counsel for defendants and advise the Court that they have stipulated to the following facts:

1. This matter is before the Court on plaintiff Allstate Insurance Company's petition for interpleader regarding the proceeds under a policy of insurance numbered 50 343927. The policy at issue provided for coverage in the amount of $100,000 for personal property and $500,000 for real property loss.

2. Allstate Insurance Company has been released as a plaintiff under this Court's order and judgment dated February 27, 2002.

3. Defendant Biddle Street Bistro, Inc. is the only party claiming any interest in the proceeds of the personal property component of the insurance, and there are no disputes regarding the same.

4. Biddle Street Bistro, Inc. has withdrawn any claim to interest on the $100,000 component representing the personal property recovery under the policy. This disclaimer of interest does not apply to any interest accrued after payment by Allstate into the control of the Court. It is expressly acknowledged that any interest earned on the monies held by the Court will be paid exclusively to Biddle Street Bistro.

Having been advised of the above, judgment is hereby entered finding that Biddle Street Bistro, Inc. is entitled to disbursement of the interplead funds in the amount of $100,000, which amount represents the proceeds from the personal property component of the policy. The clerk of the court is hereby ordered and directed to disburse the same, payable to Biddle Street Bistro, Inc. and Dickhaus and Associates, LC jointly.

s/_____
Karl W. Dickhaus, E.D. #80043
Attorneys for Biddle Street Bistro, Inc.
1750 S. Brentwood, Ste. 300
St. Louis, Missouri 63144
Telephone (314) 962-9000
Facsimile (314) 962-5083

BIDDLE STREET BISTRO, INC.

By: s/_____
Jeffery R: Eilers President

SO ORDERED,

s/_____

Judge Stephen N. Limbaugh

DATED: 4/29/02

AN ORDER, JUDGMENT OR ENDORSEMENT WAS SCANNED, FAXED AND/OR MAILED TO THE FOLLOWING INDIVIDUALS ON 04/29/02 by aluisett

4:01cv1513 Allstate Insurance vs Biddle Street Bistro

28:1332 Diversity-Insurance Contract

Karl Dickhaus -	80043	Fax: 314-962-5083
Michael Hunter -	70351	Fax: 314-345-5055

SCANNED & FAXED BY
APR 29 2002
C.D.D.

CERTIFICATE OF COMPLIANCE

We, Pro Se Shareholders for Appellant, certify that the number of words in the brief of Appellant is 3,320, as directed by F.R.A.P. 32(a)(7), which is based on a word count of the word processing system. The name and version of the word processing software used to prepare the brief is Microsoft Word 2000.

s/_____
Janet Tennant
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St. Louis, Missouri 63102
314/780-0953
Fax: 314/241-2330
Pro Se Shareholder for Appellant

s/_____
Jeff Eilers
5506 Grace Avenue
St. Louis, Missouri 63116
314/580-6729
Pro Se Shareholder for Appellant

CERTIFICATE OF SERVICE

Comes now _____ and after being duly sworn and upon his/her oath states that on the _____ day of _____, 2002, two copies of the brief of Appellant Biddle Street Bistro, Inc., were mailed to: Michael B. Hunter, Attorney for Appellees TLJ Company, L.L.C. and Bremen Bank and Trust Company, 10 South Broadway, Suite 1600, St. Louis, Missouri 63102.

s/_____
Janet Tennant
400 North 0' Street, #2801
St. Louis, Missouri 63102
314/780-0953
Fax: 314/241-2330
Pro Se Shareholder for Appellant

s/_____
Jeff Eilers
5506 Grace Avenue
St. Louis, Missouri 63116
314/580-6729
Pro Se Shareholder for Appellant

Subscribed and sworn to before me this ___ day of, 2002.

s/_____
Notary Public

My commission expires:

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ALLSTATE INSURANCE
COMPANY,
Interpleader Plaintiff,

v.

BIDDLE STREET BISTRO, INC.
Defendant / Appellant,

TLJ COMPANY, L.L.C. and
BREMEN BANK AND TRUST COMPANY,
Defendants / Appellees.

Appeal No. 02-3141

MEMORANDUM OF FILING COMPUTER DISKETTE

COMES NOW Appellant and files a computer diskette containing the full text of Appellant's brief. The diskette has been scanned for viruses, and it is virus free.

s/_____

Janet Tennant
400 North 4th Street, #2801
St. Louis, Missouri 63102
314/780-0953
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Pro Se Shareholder for Appellant

s/_____
Jeff Eilers
5506 Grace Avenue
St. Louis, Missouri 63116
314/580-6729
Pro Se Shareholder for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed this ____ day of October, 2002, to Michael B. Hunter, Attorney for Appellees TLJ Company, L.L.C. and Bremen Bank and Trust Company, 10 South Broadway, Suite 1600, St. Louis, Missouri 63102.

s/_____

Appendix F
Exhibit H

United States Court of Appeals
For the Eighth Circuit

Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

VOICE 014) 244-4400
FAX (314) 244-2780

November 18, 2002

Ms. Janet Tennant
400 North 4th Street
#2801
St. Louis, MO

Mr. Jeff Eilers
5506 Grace Avenue
St. Louis, MO 63116

Re: No. 02-3141 *Biddle Street Bistro. Inc. v TLJ Company, L.L.C. et al,*

Dear Ms. Tennant and Mr. Eilers:

This will acknowledge receipt of your "Reply Brief" in this matter. When we received the Reply Brief, we reviewed the file and noted your attorney, Mr. Dickhaus, was granted leave to withdraw on October 4, 2002. This

prompted a review of all of the filings in your appeal, and it appears that you have made all of the filings without benefit of counsel.

While an individual may proceed pro se, a corporation cannot proceed pro se by its shareholders or officers. *U.S. v Van Stelton,* 988 F.2d 70 (8th Cir. 1993) and *Carr Enters. Inc. v. United States,* 698 F.2d 952 *(8th* Cr. 1985). As a result, your notice of appeal, as well as all of your subsequent pleadings, are subject to being stricken and your appeal is subject to being dismissed. While I apologize for the fact that this was not noted earlier, the validity of your notice of appeal is a jurisdictional issue which the court may examine at any time.

As a courtesy to you, I will hold the appeal in abeyance for 30 days to permit you to consult and retain legal counsel and for your attorney to determine whether there is any motion or other legal pleading which could be filed to validate your prior filings.

At the end of this period of time, I will refer the case to the court for a determination as to whether the appeal must be dismissed or should be permitted to proceed.

Sincerely,

s/_____
Michael E. Gans
Clerk of Court

MEG/jpp

co: Mr. Michael B. Hunter

Appendix G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ALLSTATE INSURANCE COMPANY,
Interpleader Plaintiff,

vs.

BIDDLE STREET BISTRO, INC.,
Defendant / Appellant

TLJ COMPANY, L.L.C. and
BREMEN BANK AND TRUST COMPANY,
Defendants / Appelleees.

Appeal No. 02-3141

Appeal from the United States District Court

Eastern District of Missouri
Eastern Division

MEMORANDUM IN SUPPORT OF APPELLANT BIDDLE STREET BISTRO'S MOTION TO SUBMIT CORRECTED NOTICE OF APPEAL AND ADOPT PLEADINGS PREVIOUSLY FILED PRO SE

INTRODUCTION

Jeffery Eilers and Janet Tennant are the sole shareholders of Biddle Street Bistro (hereafter BSB) which is a corporate entity. BSB was named as a defendant in an interpleader suit filed in the United States District

Court, Eastern District, along with TLJ Company, Inc. (hereafter TLJ) and Bremen Bank and Trust Company, L.L.C. (hereafter Bremen). BSB was represented by counsel. At issue was the allocation of insurance proceeds from an insurance policy Eilers and Tennant purchased to protect BSB's interests in property located at 220 Biddle Street, St. Louis, Missouri.

BSB was running a restaurant called "J's on the Landing" at that location. While they were in possession of the premises, the building and its contents were destroyed by fire. At that time, Bremen held a mortgage on the property, and TLJ held the deed on the property.

The district court granted BSB's motion for partial summary judgment and awarded it the entire policy limits for the personal property coverage. The district court then granted TLJ's and Bremen's motions for summary judgment concerning the policy limits for the damage to the building, and ordered that the insurance proceeds for building damage be paid to them. Eilers and Tennant were not aware of TLJ's or Bremen's motions for summary judgments or the district court's order granting them until August 20, 2002. (App. 392-395).

BSB wished to appeal the district court's order granting TLJ's and Bremen's motions for summary judgment. BSB filed a notice of appeal with the district court clerk within the time required by FRAP 4(a)(1)(A). (App. 399-402). They also paid the docket fees required by FRAP3(e) in a timely fashion. The notice of appeal was only signed by Eilers and Tennant as pro se shareholders of BSB. (App. 399-402).

Eilers and Tennant on behalf of BSB subsequently filed a corporate disclosure statement and a designation of record in a timely fashion. The Eighth Circuit

Clerk then provided a scheduling order. BSB met all of the filing deadlines with pleadings that conformed to all Federal Rules of Appellate Procedure and Eighth Circuit Local Rules regarding form and content. BSB then filed an Appellant's Brief within the required time. That brief conformed with all Federal Rules of Appellate Procedure and Local Rules regarding form and content as well.

Appellees then filed a brief. Appellees did not contest this Court's jurisdiction and responded to Appellant's Brief on its merits. This matter was then sent to screening for oral argument. Within the time allowed to respond to Appellees' Brief, Eilers and Tennant filed a Reply Brief on behalf ofBSB. In correspondence received from the Eighth Circuit Clerk dated November 18, 2002, the Clerk acknowledged receipt of BSB's Reply Brief, but indicated that a corporation cannot proceed pro se by its shareholders or officers, and that as a result BSB's notice of appeal was subject to being stricken, and its appeal was subject to dismissal. The Clerk apologized for not noting this earlier, but stated that the validity of a notice of appeal was a jurisdictional issue that the Court could examine at any time. The Clerk indicated that as a courtesy he would hold the appeal in abeyance for 30 days to permit Eilers and Tennant to retain legal counsel and validate their prior filings. Counsel has entered an appearance for BSB.

ARGUMENT

The Federal Rules of Appellate Procedure do not require that BSB's pleadings be stricken or its appeal dismissed because its notice of appeal was not signed by an attorney. On the contrary, the principles guiding the Federal Rules of Appellate Procedure, as well decisions interpreting this issue from the United States Supreme Court and neighboring Circuits, clearly indicate that

this Court has the authority to allow BSB to amend its notice of appeal so that it is signed by an attorney and decide BSB's appeal on its merits.

The United States Supreme Court has held that the requirement that a notice of appeal be signed is not jurisdictional.

> Federal Rule of Appellate Procedure 3(a) provides, in pertinent part, that "[a]n appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4." Rule 3(c) governs the content of notices of appeal: Notices "shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Courts will liberally construe the requirements of Rule 3. *Smith v Barry* 502 U.S. 244, 247, 112 S.Ct. 678, 680 (1992).

The United States Supreme Court in *Becker v Montgomery* also held that Federal Rule of Appellate Procedure 3(c)(2) does not dislodge the signature requirement from its Civil Rule 11(a) moorings and make it an Appellate Rule 3 jurisdictional specification. , at 532 U.s. 757, 759, 121 S.Ct.1801, 1803 (2001).

In *Thiem v Hertz Corporation,* 732 F.2d 1559 (11th Cir. 1984), the Eleventh Circuit was faced with a situation where a notice of appeal which met the requirements of Rule 3 was unsigned by an attorney. The Eleventh Circuit noted that the only provisions for the content of the notice of appeal are found in Federal Appellate Rule 3(c) which states that the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part

thereof appealed from; and shall name the court to which the appeal is taken. j4. at 732 F.2d 1559, 1562. The Eleventh Circuit refused to dismiss the appeal simply because the notice was unsigned by an attorney reasoning that the Federal Rules of Appellate Procedure have no provisions for signing pleadings, as is found in Rule 11, Fed.R.Civ.P, and doubted Rule 11 applied to notices of appeal at all. I4 at 732 F.2d 1559,1563. The Court concluded: "[i]n any event, it appears clear that the rules do not require a decision that this Court is without jurisdiction to hear this appeal." . The Fifth Circuit has also held that an unsigned notice of appeal, even if it does not meet the demands of Fed. R. Civ. P. 11, meets the jurisdictional requirements for appeal. *McNeil v Blackburn,* 802 F.2d 830, 832 5th Cir. 1986).

BSB's notice of appeal complied with the requirements of Federal Appellate Rule 3(c) to the letter. Their notice of appeal specified the party taking appeal, designated the order appealed, and identified the court to which the appeal was taken. In fact, it was sufficient to allow Appellees's counsel to craft the appropriate responsive pleadings and a Brief which argued the merits of its appeal.

Imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court. *Becker,* supra, 532 U.S. at 759, 121 S.Ct. at 1803, citing *Smith v. Barry* 502 U.S. 244, 245, 248-249,112 S.Ct. 678, 116 L.Ed.2d 678. It is contrary to the spirit of the Federal Rules of Appellate Procedure for decisions on the merits to be avoided on the basis of technical failing in the pleadings. The intent of the 1993 Rule 3 amendments, as explained in the 1993 advisory committee notes, is to liberalized the pleading require-

ments for a notice of appeal." *Ford v Elsbury* 32 F.3d 931, 933-934 (5th Cir. 1994). The advisory committee note to the 1993 amendment in relevant part states:

> Finally, the rule makes it clear that dismissal of an appeal should not occur when it is otherwise clear from the notice that the party intended to appeal. If a court determines it is objectively clear that a party intended to appeal, there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward. 14. 32 F.3d 931 at footnote #2.

The Eighth Circuit traditionally construes notices of appeal liberally, but the intent to appeal the judgment in question must be apparent and there must be no prejudice to the adverse party. *Burgess v Suzuki Motor Co. Ltd, 71 F.3* d 304,307 (8th Cir 1995) citing *Klandt v United States Dep't of Interior,* 990 F.2d 409, 411 (8th Cir. 1993) and *Berdella v Delo* 972 F.2d 204, 207 (8th Cir. 1992). Biddle Street Bistro is only asking to amend its notice of appeal by allowing it to be signed by an attorney licensed to practice before this Court. It is not asking for leave to amend the issues before this Court, the portions of the record below that it relied upon, or the arguments it presented in its Briefs. The undersigned counsel has reviewed all of the pleadings filed on behalf of BSB and wishes to adopt them without amendment. Counsel has submitted and filed with the Court new copies of these pleadings with counsel's signature. The adverse parties have already responded to these pleadings. Accordingly, there can be no prejudice to any party by allowing Appellant to save its appeal and for the Court to render a decision on the merits.

CONCLUSION

The essence of Rule 3, both in its language and in the construction given to it by the courts, is liberality. Public policy encourages that appeals be heard on the merits. The undersigned counsel has reviewed the pleadings filed on behalf of BSB and the legal basis for the arguments contained in BSB's brief. The undersigned has found that the pleadings meet with this Court's jurisdictional requirements, that BSB's legal arguments are sound, and wishes to adopt them without amendment. Appellees have already filed their brief on the merits of Appellant's arguments, so there could be no resulting prejudice.

WHEREFORE Appellant Biddle Street Bistro respectfully requests this court to allow it to amend its notice of appeal by having it signed by the undersigned counsel, and to allow the undersigned counsel to adopt the pleadings filed pro se by Eilers and Tennant on Biddle Street Bistro's behalf.

Respectfully Submitted,
BRINKER & DOYEN, L.L.P.

By: s/_____

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Clayton, Missouri 63105
(314)-863-6311
(314)-863-8197
Attorney for Appellant Biddle Street Bistro, Inc.

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed this _____day of December, 2002, to Michael B. Hunter, Attorney for Appellees TLJ Company, L.L.C. and Bremen Bank and Trust Company, 10 South Broadway, Suite 1600, St. Louis, Missouri 63102.

s/_____

Appendix H

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ALLSTATE INSURANCE COMPANY,
Plaintiff,

v.

BIDDLE STREET BISTRO, INC.,
Defendant / Appellant,

TLJ COMPANY L.L.C. and,
BREMEN BANK AND TRUST COMPANY,
Defendants / Appellees.

No. 02-3141

TLJ COMPANY L.L.C AND BREMEN BANK AND TRUST COMPANY'S MEMORANDUM IN OPPOSITION TO BIDDLE STREET BISTRO INC.'S MOTION FOR LEAVE

Biddle Street Bistro, Inc. (hereinafter "BSB") admits that it filed a pro se Notice of Appeal on the last day permissible under FRAP Rule 4. BSB admits that all pleadings filed thereafter prior to the current December 17, 2002 Motion for Leave were filed pro se. BSB argues that this is not a jurisdictional defect and that TLJ Company L.L.C. (hereinafter "TLJ") and Bremen Bank and Trust Company (hereinafter Bremen") are not prejudiced. An improper pro se Notice of Appeal is

invalid and, as such, it was never properly or timely filed. BSB failed to properly invoke the jurisdiction of this court.

BSB argues that *Smith v. Barry* holds that failure to sign a Notice of Appeal is not a jurisdictional defect. However, this is an inaccurate reading of *Smith v. Barry*. Rather, the issue in *Smith v. Barry* was whether a pro se informal brief filed within the time restraints of Rule 4 for Notices of Appeal served as the functional equivalent of a Notice of Appeal. Smith v. Barry, 502 U.S. 244, 248, 112 S.Ct. 678, 682 (1992). The Court held that it could so serve. *Id* at 245. Further, the appellant in *Smith v. Barry* was an individual who is entitled to represent himself pro se. Here, BSB must be represented by an attorney in federal court. In the instant action Appellees concede that BSB attempted to file a document in the proper format. However, the Notice should be treated as having never been filed as it was not filed by an attorney representing BSB.

One cannot say that FRAP Rule 3 has been followed when a corporation, specifically precluded from appearing pro se before a federal court, files the Notice of Appeal. "Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review. (citation omitted). Although courts should construe Rule 3 liberally when determining whether it has been complied with, noncompliance is fatal to an appeal." Id at 248. BSB did not comply with Rule 3.

Becker v. Montgomery is likewise inapplicable to the issue before this Court. There, a pro se appellant failed to sign a Notice of Appeal although his typed name appeared on the form. He attempted to fix the problem. The Court held that the signature requirement is based on FRCP Rule 11(a) which provides that one can correct

the failure to sign a pleading and, that since the signature requirement was not in FRAP Rule 3, it was not jurisdictional. *Becker v. Montgomery,* 532 U.S. 757, 758, 121 S.Ct. 1801, 1803 (2001). Becker merely failed to sign the notice. His right to proceed pro se on appeal was not at issue.

Similarly, *Theim v. Hertz Corporation* fails to address the pertinent issue. In *Theim* a represented individual plaintiff filed a Notice of Appeal through his attorney that was proper but for the attorney's failure to sign where his name was already typed on the notice. *Theim v. Hertz Corporation, 732* F.2d 1559, 1562 (11th Cir. 1984). The issue was not the capacity of the party to file the Notice but whether the Notice was properly filed in that it was not signed. The court found it maintained jurisdiction over the appeal though the appellant failed to sign the otherwise proper Notice. *Id* at 1562-63.

McNeil v. Blackburn fails to assist BSB. It, like the other cited cases, focuses on a technical defect in the Notice, not in the capacity of the party to file the Notice. However, it provides a general statement of jurisdiction that Appellees submit is of assistance in analyzing the current dispute. The court states, "[a]lthough neither party has questioned the jurisdiction of this court to hear this appeal, this is a court of limited jurisdiction and this court must, on its own motion, determine if jurisdiction is present." *McNeil v. Blackburn,* 802 F.2d 830, 831-32 (5th Cir. 1986)(citation omitted). Thus, this Court must determine whether it has jurisdiction though TLJ and Bremen did not raise the issue.

BSB also cites Ford v. Elsbury, 32 F.3d 391 (5th Cir. 1994), stating that the purpose of the 1993 amendment to FRAP 3 was to liberalize the pleading requirements

for a Notice of Appeal. It is not the content of BSB's Notice that is the problem. Rather, it is that it was filed by an entity that is not allowed to proceed before this court.

BSB concludes its argument by reference to prior decisions of this Court. Again, all of the cited cases deal with the sufficiency of the content of the Notice of Appeal, not whether it was properly filed to begin with. Further, this Court struck portions of the appeal for failure to comply with FRAP Rule 3 in *Klandt* and *Berdella*, two of the three cited cases. TLJ and Bremen agree that striking an appeal is appropriate when an appellant fails to comply with Rule 3.

As to the issue raised by Hon. Michael Ganz in his November 18, 2002 letter to BSB, the law is clear that a corporation may only appear before a federal court through licensed counsel. *Rowland v. California Men's Colony,* 506 U.S. 194, 202, 113 S.Ct. 716, 721 (1993).

The Eighth Circuit has consistently refused to recognize pleadings of a corporation without counsel. In refusing to consider the appeal of one pro se corporation this Court stated, "[w]e conclude that [pro se corporate appellant] Mystery Boy is not a proper party to the appeal because it is not represented by counsel, and a corporation cannot appear pro se. *Mystery Boy Incorporated v. Postal Service,* 27 F.3d, 572, 1994 WL 312818, **1 (8th Cir. (Iowa)). See also *First Horizon Corporation v. Singleton et al.,* 129 F.3d 121, 1997 WL 636616, **1 (8th Cir.(Mo.)) (pro se corporation would not have been a proper party to the appeal had it joined the individual appellant's Rule 60(b) motion); *United States v. Lylalele, Inc.,* 221 F. 3d 1345, 2000 WL 688237, **1 (proper for district court to have stricken pleadings filed by pro se representative of corporation as it could

not proceed without counsel); *United States v. Van Stelton,* 988 F.2d 70 (8th Cir. 1993) (pro se corporation found not a party to the appeal because not represented by counsel); *Ackra Direct Marketing Corp. v. Fingerhut Corp.,* 86 F.3d 852, 857 (8th Cir. 1996) (corporate party was noted to be technically in default when its counsel was allowed to withdraw as it could not proceed pro se).

The appellant is required to file a Notice of Appeal under FRAP 3 to invoke the jurisdiction of this court. The form of Rule 3 as existed at the time BSB attempted to file its Notice of Appeal, includes various provisions stating, in essence, that technical defects on the face of the Notice will not result in dismissal. However, BSB's Notice was defective not in form but was invalid in its entirety.

BSB is prohibited from appearing before this court without counsel. Any action taken by BSB before this Court without counsel is invalid. The Notice of Appeal filed was filed by BSB without counsel on the last day permissible under FRAP Rule 4. The decisions of this Court cited by appellees herein demonstrate that the notice filed by BSB is invalid. Accordingly, BSB's motion for leave should be denied and the appeal dismissed.

Wherefore Appellees, TLJ Company L.L.C. and Bremen Bank and Trust Company, by and through undersigned counsel, pray the Court deny appellant's Motion for Leave and for such other and further relief as this Court deems just and proper under the circumstances.

WILLIAMS VENKER & SANDERS, L.L.C.

By: s/_____
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Equitable Building
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St. Louis, MO 63102
(314) 345-5000
(314) 345-5055 FAX
ATTORNEYS FOR TLJ COMPANY, L.L.C. and BREMEN BANK AND TRUST COMPANY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the above and foregoing was mailed, postage prepaid, this 26 day of December, 2002, to:

Gary Paul
Brinker .& Doyen LLP
120 S. Central
St. Louis, MO 63105
Attorneys for Plaintiff

Janet Tennant
400 North 0 Street
St. Louis, Missouri 63102

Jeff Eilers
5506 Grace Avenue
St. Louis, Missouri 63116.

s/_____

Appendix I

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ALLSTATE INSURANCE COMPANY,
Interpleader Plaintiff,

v.s

BIDDLE STREET BISTRO, INC.,
Defendant / Appellant

TLJ COMPANY, L.L.C. and
BREMEN BANK AND TRUST COMPANY,
Defendants / Appelleees.

Appeal No. 02-3141

Appeal from the United States District Court
Eastern District of Missouri
Eastern Division

BIDDLE STREET BISTRO INC.'S REPLY TO TLJ AND BREMEN'S MEMORANDUM IN OPPOSITION TO BSB'S MOTION FOR LEAVE

TLJ Company L.L.C. (hereinafter "TLJ) and Bremen Bank and Trust Company (hereinafter "Bremen") argue that Biddle Street Bistro Inc.'s (hereinafter "BSB") appeal should be dismissed because its notice failed to comply with Federal Rule of Appellant Procedure 3. However, they fail to cite which Rule 3 requirement

Appellant's Notice of Appeal violates. In fact, TLJ and Bremen concede that BSB filed its Notice in the proper format, and that the content of BSB's Notice was not a problem. (Appellees' Memorandum in Opposition at pages 2 and 3). TLJ and Bremen's also fail to cite any authority which suggests that BSB's filing its notice of appeal pro se requires this Court to dismiss its appeal.

The issue before the Court is not whether BSB can be represented pro se by its shareholders. At the time BSB filed its Notice of Appeal, BSB was represented by Attorney Karl Dickhaus who is an attorney authorized to practice before this Court. BSB filed its Notice of Appeal on August 21, 2002. (App. Page 399 and 400). Attorney Dickhaus was not granted leave to withdraw as counsel for BSB by this Court until October 4, 2002. The issue is whether BSB should be given the opportunity to have its appeal decided upon its merits by allowing it to amend its Notice of Appeal to contain the signature of counsel authorized to practice before this Court. On this issue, the United States Supreme Court and the authors of the Federal Rules of Appellate Procedure provide a clear and unambiguous answer. This Court has jurisdiction if BSB filed a timely Notice of Appeal that met the requirements of Rule 3. TLJ and Bremen do not contest that BSB's Notice of Appeal followed Rule 3's requirements to the letter. They argue that BSB's Notice of Appeal was a nullity simply because it was not signed by an attorney authorized to practice before this Court. The United States Supreme Court clearly disagrees with TLJ and Bremen's conclusion. The Supreme Court has held that Rule 3 does not include a signature as a jurisdictional requirement. "[A] signature requirement is not among Rule 3(c)(1)'s specifications, for Civil Rule 11(a) alone calls for and controls that requirement and renders it nonjurisdictional." *Becker v Montgomery*. 532 U.S. 757,

766, 121 S.Ct. 1801, 1807 (2001). In *Becker* the Supreme Court then held that the appropriate remedy for an unsigned notice of appeal was to allow appellant to remedy the lapse by filing a duplicate notice of appeal with a signature. *Id.*

TLJ and Bremen cite several cases in which this Court held that corporations cannot be represented pro se by their shareholders or officers. However, none of the cases cited by TLJ and Bremen addressed the sufficiency of the appellants' notices of appeals. A review of these cases reveals the true spirit of Rule 3, and public policy that encourages appeals to be decided on their merits. In each of cases cited by TLJ and Bremen, this Court decided the appeal based upon its merits. In *Mystery Boy Incorporated v Postal Service* 27 F.3d 572, 1994 WL 312818 (8th Cir.(Iowa)), for example, this Court went on to consider the merits of appellants' appeal even after it concluded that Mystery Boy was not a proper party, and that the pro se litigant failed to provide a transcript in accordance with Rule 10(b).

In addition, TLJ and Bremen do not even suggest they would be prejudiced if the Court grants BSB's motion. Prejudice would be impossible because TLJ and Bremen have already filed responsive pleadings and a brief which argue the merits of BSB's appeal. Granting this Motion would be consistent with the Supreme Court's decisions concerning the appropriate remedy, and allow justice to be served by allowing BSB's appeal to be decided upon its merits.

Respectfully Submitted,
BRINKER & DOYEN, L.L.P.

By: s/_____
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Clayton, Missouri 63105
(314)-863-6311
(314)-863-8197
Attorney for Appellant Biddle Street Bistro, Inc.

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed this __day of December, 2002, to Michael B. Hunter, Attorney for Appellees TLJ Company, L.L.C. and Bremen Bank and Trust Company, 10 South Broadway, Suite 1600, St. Louis, Missouri 63102.

s/_____

Appendix J

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-3141

Biddle Street Bistro, Inc.,
Appellant,

vs.

TLJ Company, L.L.C.;
Bremen Bank and Trust Company,
Appellees.

Appeal from the United States
District Court for the
Eastern District of Missouri

JUDGMENT

Having considered apellant's motion for leave to submit a corrected notice of appeal and to adopt pleadings previously filed pro se, we deny the motion and dismiss the appeal for lack of jurisdiction for failure to file a valid notice of appeal. (5361-010199)

February 12, 2003

Order Entered at the Direction of the Court

s/_____

Clerk, U.S. Court of Appeals, Eighth Circuit

Appendix K

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeal No. 02-3141

ALLSTATE INSURANCE COMPANY,
Interpleader Plaintiff

v.

BIDDLE STREET BISTRO, INC.
Defendant / Appellant

TLJ COMPANY, L.L.C. and
BREMEN BANK AND TRUST COMPANY,
Defendants / Appellees.

Appeal from the United States District Court
Eastern District of Missouri
Eastern Division

The Honorable Stephen N. Limbaugh,
Senior United States District Judge

PETITION FOR REHEARING BY PANEL

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Attorney for Appellant Biddle Street Bistro, Inc.

SUMMARY OF THE CASE

Allstate Insurance Company interplead the funds of a premises liability insurance policy. (App 1-3)[1] The named insured, owner of the property, and mortgagee were named as co-defendants. Biddle Street Bistro (hereafter BSB) Occupied the destroyed premises and was the named insured of the policy. TLJ Company, Inc. (hereafter TLJ) was the owner of the property, and Bremen's Bank and Trust Company, L.L.C. was the mortgagee of the property. BSB, TLJ and Bremen each made a claim to the insurance proceeds. (App. 89 and 92).

The district court granted BSB's motion for partial summary judgment and awarded it the entire policy limits for the personal property coverage. (App. 5-7).

The district court then granted TLJ's and Bremen's motions for summary judgment concerning the policy limits for the building damage. (App. 8-10).

BSB was unable to communicate with its attorney of record, and was not aware of TLJ's or Bremen's motions and the district court's order granting their motions until August 20, 2002, the day before that court's order was to become final. (App. 59 and 61) BSB then filed its notice of appeal. (App. 66-69).

BSB's notice of appeal was filed pro se by its only two shareholders, Jeffrey Eilers and Janet Y. Tennant. (App. 399-402). Eilers and Tennant on behalf of BSB subsequently met all of the filing deadlines with pleadings that conformed to all Federal Rules of Appellate Procedure and Eighth Circuit Local Rules regarding form and content. BSB then filed an Appellant's Brief within the required time.

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[1] Appellant's separate appendix will be referred to as "App."

Appellees then filed a brief. Appellees did not contest this Court's jurisdiction and responded to Appellant's Brief on its merits. Within the time allowed to respond to Appellees' Brief, Eilers and Tennant filed a Reply Brief on behalf ofBSB. In correspondence received from the Eighth Circuit Clerk dated November 18, 2002, the Clerk acknowledged receipt of BSB's Reply Brief, but indicated that a corporation could not proceed pro se by its shareholders or officers, and that as a result BSB's notice of appeal was subject to being stricken, and its appeal was subject to dismissal. Clerk Gans then directed Eilers and Tennant to obtain counsel within 30 days.

Ellers and Tennant immediately obtained counsel. The undersigned counsel within 30 days filed a Motion to Submit Corrected Notice of Appeal and Adopt Pleadings Previously Filed Pro Se. On February 12, 2003 the Court denied BSB's motion and dismissed its appeal for lack of jurisdiction for failure to file a valid notice of appeal.

CORPORATE DISCLOSURE STATEMENT

Biddle Street Bistro, Inc. has no parent companies or subsidiaries not wholly owned by the corporation. No publicly held company owns ten percent or more of the corporation's stock.

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STATEMENT OF THE ISSUES

The Court overlooked or misapprehended the following points of law or facts as shown by its Judgment.

A. Federal Rules of Appellate Procedure do not require that a notice of appeal be signed for this Court to have jurisdiction.

B. The filing of a notice of appeal prose by BSB's sole shareholders, Eilers and Tennant, did not require that BSB's appeal be dismissed, and licensed counsel should be permitted to continue the appeal on BSB's behalf.

C. The Court failed to take into consideration that Eilers and Tennant as the sole shareholders of BSB were real parties in interest, and that as an S-Type Corporation BSB was merely an alter ego of Eilers and Tennant.

STATEMENT OF THE CASE

The case out of which the present appeal arises was an interpleader action brought by Allstate Insurance Company (hereafter Allstate). (App. 1-3). Allstate issued a policy of fire insurance to BSB which listed BSB as the only named insured, and carried coverage up to a limit of $500,000 for building damage, and up to $100,000 for personal property damage. (App. 2). Jeffery Eilers and Janet Tennant are the sole share holders of BSB. Unknown to BSB, TLJ and Bremen were listed as loss payees on its policy of insurance. (App. 2 and 52).

The district court awarded the entire $100,000 for personal property damage to BSB. (App. 5-7). The district court then granted TLJ's and Bremen's motions for summary judgment, and awarded the entire amount of the $500,000 policy for building damage to TLJ and

Bremen. (App. 8-10). Because of the unresponsiveness of its counsel, BSB was unaware of TLJ's and Bremen's motions for summary judgment and the district court's order granting them until August 20, 2002, the day before that court's order became final.(App. 59 and 61).

Eilers and Tennant as pro se shareholders of BSB then filed its Rule 60(b) motion and notice of appeal within the time required by FRAP 4(a)(1)(A). They also paid the docket fees required by FRAP 3(e) in a timely fashion. At the time BSB filed its Notice of Appeal, BSB was represented by Attorney Karl Dickhaus who is an attorney authorized to practice before this Court. However, Eilers and

Tennant filed a Notice of Appeal on behalf of BSB on August 21, 2002 as pro se shareholders. (App. Pages 399 and 400).

Eilers and Tennant on behalf of BSB subsequently filed a corporate disclosure statement and a designation of record in a timely fashion. The Eighth Circuit Clerk then provided a scheduling order. BSB met all of the filing deadlines with pleadings that conformed to all Federal Rules of Appellate Procedure and Eighth Circuit Local Rules regarding form and content. BSB then filed an Appellant's Brief within the required time. That brief conformed with all Federal Rules of Appellate Procedure and Local Rules regarding form and content as well.

Appellees then filed a brief. Appellees did not contest this Court's jurisdiction and responded to Appellant's Brief on its merits. This matter was then sent to screening for oral argument. Within the time allowed to respond to Appellees' Brief, Eilers and Tennant filed a Reply Brief on behalf of BSB. In correspondence received from the Eighth Circuit Clerk dated November

18, 2002, the Clerk acknowledged receipt of BSB's Reply Brief, but indicated that a corporation cannot proceed pro se by its shareholders or officers, and that as a result BSB's notice of appeal was subject to being stricken, and its appeal was subject to dismissal. The Clerk apologized for not noting this earlier, but stated that the validity of a notice of appeal was a jurisdictional issue that the Court could examine at any time. The Clerk indicated that as a courtesy he would hold the appeal in abeyance for 30 days to permit Eilers and Tennant to retain legal counsel and validate their prior filings. Counsel entered an appearance for BSB, and within 30 days filed a Motion to Submit Corrected Notice of Appeal and Adopt Pleadings Previously Filed Pro Se. With the motion, all pleadings and briefs previously filed pro se were re-filed bearing the undersigned's signature. The Court denied BSB's motion on February 12, 2002 and dismissed its appeal for lack of jurisdiction for failure to file a valid notice of appeal.

ARGUMENT

A. *Federal Rules of Appellate Procedure do not require that a notice of appeal be signed for this Court to have jurisdiction*

The Federal Rules of Appellate Procedure do not require that notices of appeal be signed for this Court to have jurisdiction. The United States Supreme Court has held that the requirement that a notice of appeal be signed is not jurisdictional.

> Federal Rule of Appellate Procedure 3(a) provides, in pertinent part, that "[a]n appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4." Rule 3(c) governs the content of notices of appeal: Notices "shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken." Courts will liberally construe the requirements of Rule 3. *Smith v Barry,* 502 U.S. 244, 247, 112 S.Ct. 678, 680 (1992).

The United States Supreme Court in *Becker v Montgomery* also held that Federal Rule of Appellate Procedure 3(c)(2) does not dislodge the signature requirement from its Civil Rule 11(a) moorings and make it an Appellate Rule 3 jurisdictional specification. *Id.* at 532 U.S. 757, 759, 121 S.Ct. 1801, 1803 (2001). In *Becker* the Supreme Court reasoned that the requirement that a notice of appeal be signed when filed in the district court only comes from Federal Rule of Procedure 11(a) which provides that every paper filed with the district court shall be signed. *Id.* at 532 U.S. 757, 758, 121 S.Ct. 1801, 1805 (2001). The Supreme Court then reasoned

that failure to sign a notice of appeal as required by Civil Rule of Procedure 11(a) could not require dismissal of the appeal because Rule 11(a) itself states that the omission of a signature may be corrected promptly after being called to the attention of the attorney or party. The Supreme Court also noted that this conclusion was in harmony with Federal Rule of Appellate Procedure Rule 3(c)(4) which provides: "An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice." *Id.* 532 U.s. 757, 759, 121 S.Ct. 1801, 1807-1808 (2001) citing *Smith v Barry* (*supra* at 502 U.S. 244, 245, 248-249, 112 S.Ct. 678, 116 L.Ed.2d 678.

B. *The filing of a notice of appeal pro se by BSB's sole shareholders Eilers and Tennant did not require BSB's appeal be dismissed and licensed counsel should be permitted to continue the appeal on BSB's behalf*

The majority of Circuit Courts that have considered the effect of a notice of appeal filed on behalf of a corporation by a corporate officer who is not authorized to practice law have ruled that a pro se signature is not fatal to the corporations appeal. In *Bigelow v A & A Reality Limited* 170 F.3d 1164 (9th Cir. 1999), the Ninth Circuit noted that there is nothing in the Federal Rules of Appellate Procedure which requires dismissal of an appeal when a corporate officer who is not licensed to practice law signs a notice of appeal for a corporation. Id. at page 1165. "A notice of appeal is just that -a notice." *Id.* The Court failed to see any compelling reason to refuse to recognize a corporation's notice of appeal, so long as a lawyer promptly thereafter enters a formal appearance on behalf of the corporation and undertakes the representation. *Id.*

The same conclusion was reached by the First Circuit in *Instituto De Educacion Universal Corp. v United States Department of Education* 209 F.3d 181 (1st Cir. 2000). The First Circuit recognized that a non-lawyer could not represent a corporation in ongoing proceedings. However, the Court found there was a valid distinction between ongoing legal representation and the "essentially ministerial action involved in the filing of a notice of appeal." *Id.* at page 22. The Court then held that a corporate officer may sign and file a notice of appeal on behalf of a corporation, as long as the corporation then promptly retains counsel. *Id.*

Many other neighboring Circuit Courts have held that where a corporation's notice of appeal is signed by corporate officer who is not an attorney, the court may allow the appeal to proceed as along as an attorney admitted to practice before the appellate court has filed an appearance.[1]

C. The Court failed to take into consideration the Eilers and Tennant as the sole shareholders of BSB were real parties in interest and that as an S-Type Corporation BSB was merely an alter ego of Eliers and Tennant

Under 28 U.S.C. Section 1654, parties may plead and conduct their own cases personally. BSB is an S-Type corporation whose only two shareholders are Eilers and Tennant. Eilers and Tennant are personally and exclusively responsible for all of BSB's debts and taxes. BSB

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[1] See e.g., *AAA Venetian Blind Sales Inc. v Beaufieu of America Inc.* 124 F.3d 196 (6th Cir.1997) *Anunication v West Capital Financial Services* 97 F.3d 1458 (9th Cir.1996); *Lewis v Lenc-Smith Manufacturing Company,* 784 F.2d 829 (7fl Cir. 1986); *K.M.A. Inc. v General Motors Acceptance Corp.* 652 F.2d 398 (5th Cir. 1981).

is essentially their alter ego, and Eilers and Tennant are de facto real parties in interest. BSB has not engaged in any business since November 14, 2000 (the date of the fire loss). All debts and payables have been directed to Eilers and Tennant personally. BSB is currently indebted to Eilers and Tennant for over one million in United States currency. As such, no interests other than their own were affected when they filed the notice of appeal.

CONCLUSION

The essence of Federal Rule of Appellate Procedure 3, both in its language and in the construction given to it by the courts, is liberality. Rule 3 does not contain a signature as one of the jurisdictional requirements for a notice of appeal. If there is no jurisdictional requirement that a notice of appeal contain any signature, then it hardly can be argued that a notice of appeal containing a signature is a jurisdictional impediment. Neighboring Circuits have found the best remedy for notices of appeal signed by pro se shareholders is to allow licensed counsel to adopt the corporation's appeal.

This Court traditionally construes notices of appeal liberally so long as the intent to appeal the judgment in question is apparent and there is not prejudice to the adverse party. Appellees cannot be prejudiced by allowing BSB's appeal to be considered on its merits because they have already filed their brief, and all of BSB's pleadings were filed in a timely manner. Appellant, BSB, respectfully requests this Court to reconsider its Motion to Submit Corrected Notice of Appeal and Adopt Pleadings Previously Filed Pro Se, and allow BSB's appeal to be decided upon its merits.

s/___
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CERTIFICATE OF COMPLIANCE

I, the undersigned, attorney for Biddle Street Bistro, Inc., certify that the number of words in *Petition for Rehearing By Panel* of Appellant Biddle Street Bistro, is *2,279* , which is based on a word count of the word processing system. The name and version of the word processing software used to prepare the petition is Microsoft Word 2000.

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CERTIFICATE OF SERVICE

COMES NOW, Gary P. Paul, and after duly being sworn and upon his oath states that a copy of the *Petition for Rehearing By Panel* was mailed this 25th day of February, 2003, to: Michael B. Hunter, Attorney for Appellees TLJ Company, L.L.C., and Bremen Bank and Trust Company, 10 South Broadway, Suite 1600, St. Louis, Missouri 63102.

s/_____
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Attorney for Appellant

Subscribed and sworn to before me this 25th day of February, 2003.

s/_____
Teresa Schaefer Belangee
Notary Public

My commission expires:

Appendix L

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-3141

Biddle Street Bistro, Inc.,
Appellant,

vs.

TLJ Company, L.L.C., et al.,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

The petition for rehearing by the panel filed by appellant has been considered by the court and is denied.

(5193-010199)

March 12, 2003

Order Entered at the Direction of the Court:

s/_____

Clerk, U.S. Court of Appeals, Eighth Circuit

(2)

Supreme Court, U.S.
FILED
SEP 12 2003
OFFICE OF THE CLERK

No. 02-1791

In The

Supreme Court of the United States

BIDDLE STREET BISTRO, INC.,

Petitioner,

v.

TLJ COMPANY, LLC and
BREMEN BANK AND TRUST COMPANY,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Does a United States court of appeals abuse its discretion when it dismisses an appeal when the appellant is a corporation that files, through its pro se shareholders, a notice of appeal and all other appellate filings, including its brief and reply brief?

(2) Does a United States court of appeals abuse its discretion when it denies a corporation leave to file a corrected notice of appeal and all other pleadings through counsel after it has filed, through its pro se shareholders, a notice of appeal and all other appellate filings, including its brief and reply brief?

CORPORATE DISCLOSURE STATEMENT

1. Petitioner, Biddle Street Bistro, Inc., was a Defendant below. Biddle Street Bistro, Inc. has no parent companies and/or subsidiaries not wholly owned by the corporation. No publicly held company owns 10 percent or more of the corporation's stock. The corporation was wholly owned by shareholders Jeffrey Eilers and Janet Y. Tennant.

2. Respondent, TLJ Company, LLC was a Defendant below. TLJ Company, LLC has no parent companies and/or subsidiaries not wholly owned by the corporation. No publicly held company owns 10 percent or more of TLJ Company, LLC.

3. Respondent, Bremen Bank and Trust Company was a Defendant below. The parent company of Bremen Bank and Trust Company is Bremen Bancorp, Inc. Bremen Bank and Trust Company has no subsidiaries not wholly owned by it and no publicly held company owns 10 percent or more of it.

4. No review is sought by Respondent as to Plaintiff below, Allstate Insurance Company.

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COUNTER-STATEMENT OF THE CASE

Biddle Street Bistro (hereafter BSB) asks this Court to review the decision of the Eighth Circuit court of appeals to dismiss its appeal. BSB appealed the district court's entry of judgment in favor of Respondents TLJ Company, LLC (hereafter TLJ) and Bremen Bank and Trust Company (hereafter Bremen), based on the unopposed motion for summary judgment filed by Respondents.

On August 21, 2002 BSB simultaneously filed its notice of appeal and Rule 60(b) motion through pro se shareholders. Thereafter, BSB filed: (1) an Entry of Appearance; (2) an Appellant's Form A; (3) a Corporate Disclosure Statement; (4) the Appellant's Designation of Record; (5) a Notice of Method of Preparing the Record on Appeal and Statement of Issues; (6) the Appellant's Brief; (7) the Appendix; and (8) a Reply Brief, all over a three month period. The pro se shareholders signed and submitted all of the foregoing documents on behalf of BSB.

Upon receipt of the pro se Reply Brief, the Clerk of the Eighth Circuit notified the shareholders that the appeal was subject to dismissal, explaining that a corporation may not appear pro se. That November 18, 2002 letter also states that, "As a result, your notice of appeal, as well as all of your subsequent pleadings, are subject to being stricken and your appeal is subject to being dismissed." (Pet.App. at A-11). This letter did not tell BSB that the defect in its filings was related to any signature requirement.

On December 17, 2002, BSB filed, through newly retained counsel, Appellant Biddle Street Bistro's Motion for Leave to File Pleadings and Briefs Previously Filed Pro Se (Pet.App. at A-12) and Appellant Biddle Street Bistro's

Motion to Submit Corrected Notice of Appeal and Adopt Pleadings Previously Filed Pro Se. (Pet.App. at A-15). BSB has never disputed that the notice of appeal filed on August 21, 2002 was incorrect. It has never disputed that a corporation may only appear before a federal court through licensed counsel.

On February 12, 2003 the Eight Circuit court of appeals entered its judgment denying BSB's Motion for Leave and dismissing BSB's appeal for lack of jurisdiction for failure to file a valid notice of appeal. (Pet. App. at A-95). This judgment did not state that the dismissal was due to the fact that the notice lacked an appropriate signature, by counsel or anyone else. The judgment did not state that the failure to file a valid notice of appeal could never be remedied.

BSB misstates the nature of the relief it seeks. BSB really asks this Court to overrule the Eighth Circuit's refusal to sanction the continued improper pro se representation of a corporation in federal court. BSB provides no decision of any Court to support this request. BSB provides no authority stating that the Eighth Circuit would have abused its discretion by striking its Brief or other pleadings for being filed pro se. Yet striking those pleadings would have resulted in the same result, a dismissal of its appeal.

REASONS FOR DENYING THE WRIT

1. A United States court of appeals does not abuse its discretion when it dismisses an appeal when the appellant is a corporation that files, through its pro se shareholders, a notice of appeal and all other appellate filings, including its brief and reply brief, prosecuting an entire appeal without counsel.

BSB argues that the Eighth Circuit added a jurisdictional signature requirement when it dismissed its appeal. This argument lacks any support in the record. The notice of appeal as well as the numerous subsequent pro se filings were signed, but by pro se shareholders. BSB may be correct that Federal Rule of Appellate Procedure 3 contains no signature requirement. However, the Eighth Circuit never stated, or intimated, that the absence of a signature, any signature, was the basis for the dismissal. If the clerk's November 18, 2002 letter is evidence of the basis for the Eighth Circuit's finding that the notice of appeal is invalid, then the court found it was invalidly filed pro se on behalf of a corporation.

BSB avoids the real reason for the dismissal because all cases it cites in support of its Petition clearly state that a corporation may not proceed before a federal court but through counsel. BSB all but admitted the notice of appeal was improper when it requested leave to file a "corrected" notice of appeal.

BSB cites no authority contradicting the ability of the Eighth Circuit to dismiss its appeal for failure to file a valid notice when the corporation's notice was filed improperly pro se. It fails to cite authority requiring the Eighth Circuit court of appeals to allow a corporate appellant to

remedy this defect after it has submitted numerous pro se filings.

To confuse the real issue, BSB contorts the Eighth Circuit's Judgment to create a conflict with this Court's decision in *Becker v. Montgomery*, 532 U.S. 757, 121 S.Ct. 1801 (2001). In *Becker*, this Court ruled that the appeal of that individual pro se appellant should not be dismissed for failure to physically sign an otherwise valid notice of appeal. This Court held that under the very narrow circumstances of that case, he should have been allowed to file a signed notice. The entire controversy was over a missing signature and the application of Rule of Civil Procedure 11(a), an issue not present here.

Here, the Eighth Circuit did not rule that the failure to file a valid notice of appeal would always result in dismissal. It merely ruled that the appeal would be dismissed under the facts and circumstances of this case.

Here, it is uncontested that the notice and all pleadings were filed by an entity that had no legal capacity to proceed before the Eighth Circuit except though counsel. Becker's capacity to proceed pro se was not an issue.

Petitioner's suggestion that the Eighth Circuit's dismissal of its appeal conflicts with *Becker* is void of merit.

2. A United States court of appeals does not abuse its discretion when it denies a corporation leave to file a corrected notice of appeal and all other pleadings through counsel after it has filed, through its pro se shareholders, a notice of appeal and all other appellate filings, including its brief and reply brief, prosecuting an entire appeal without counsel.

BSB incorrectly turns the Eighth Circuit's denial of its motion for leave into an issue covered by Federal Rule of Civil Procedure 11(a). The denial of the motion for leave has nothing to do with any signature requirement. This issue was discussed above.

BSB fails to cite one case holding that a United States court of appeals must allow a corporation proceeding pro se, in violation of law, to file a corrected notice of appeal and all previous pro se briefs. Rather, BSB cites decisions where United States courts of appeal have granted leave to obtain counsel and file appropriate pleadings at the inception of the appeal. As each of those decisions show, the facts are important and the court of appeals may exercise discretion. None of these decisions involve pro se shareholders representing a corporation for months, filing numerous pleadings, including briefs, without counsel. The extent of the pro se representation and activity in this case is far beyond that contemplated or referred to any of the cases cited by BSB.

While BSB cited no authority for its Motion for Leave, it appears that it sought relief under Rule 26(b) allowing the appellate court to extend the time prescribed by the rules or by its orders to perform any act or may permit an act to be done after that time expires for good cause.

Rule 2 of the Federal Rules of Appellate Procedure indicates that on its own or a party's motion, a court of appeals may – to expedite its decision or for other good cause – suspend any provision of the Rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b). This Federal Appellate Rule 2 has been interpreted to grant "broad equitable discretion" to the court of appeals. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 315 (1988); 108 S.Ct. 2405, 101 L.Ed. 2d 285.

The Eighth Circuit denied BSB's Motion for Leave pursuant to that broad equitable discretion. BSB has not argued that the denial was an abuse of this discretion, nor could it under the circumstances. BSB has further failed to show that the denial of the Motion as to the notice of appeal in particular was dispositive. For example, the Eighth Circuit could have allowed BSB leave to file a corrected notice of appeal but denied the motion as to the briefs filed pro se. This would have resulted in the briefs being stricken and the appeal being dismissed. This is not a case where one procedural misstep resulted in a dismissal. The entire appeal was prosecuted contrary to law.

The decisions cited by BSB illustrate the level of discretion afforded the Eighth Circuit in determining whether or not an appeal should be dismissed for failure to file a valid notice. In each case the appellate court exercised its discretion in making a determination that the appeal would not be dismissed. The appellant only avoided dismissal by having licensed counsel enter and take the case "promptly" after the notice of appeal was filed pro se.

BSB cites *Bigelow v. A & A Realty Limited*, 179 F.3d 1164 (9th Cir. 1999) in support of its argument that the Eighth Circuit erred in denying its Motion for Leave.

However, in *Bigelow*, an attorney entered his appearance after the notice was filed, filed the brief, responded to the motions and argued the case. Id. at 1165. The court stated it found nothing in the Federal Rules of Appellate Procedure that requires dismissal of the appeal if a corporate officer signs the notice of appeal and a lawyer thereafter promptly enters his appearance and undertakes the representation. Id. The appellate court exercised its discretion in not dismissing the appeal under the circumstances before it.

Similarly, in *Instituto De Educacion Universal Corp. v. United States Department of Education*, 209 F.3d 18 (1st Cir. 2000), the First Circuit addressed only whether a corporate officer may sign a notice of appeal on behalf of a corporation. Id. at 22. It held that filing the notice of appeal was not ongoing legal representation that required an attorney and that as long as the corporate appellant promptly retained counsel, a corporate officer could sign the notice of appeal. Id. Again, the appellate court exercised its discretion in not dismissing the appeal under the particular circumstances.

In *AAA Venetian Blind Sales, Inc. v. Beaufieu of America, Inc.*, 124 F.3d 196, 1997 WL 476517 (6th Cir. (Mich.)), the Sixth Circuit Court of Appeals exercised its discretion in declining to dismiss an appeal because a licensed attorney failed to sign the corporation's notice of appeal. Id. at *2. There, the court noted that a licensed attorney filed an entry of appearance and the appellant's brief. Id.

In *Anunciation v. West Capital Financial Services Corp.*, 97 F.3d 1458, 1996 WL 534049 (9th Cir. (Nev.)), the

Ninth Circuit exercised its discretion in allowing an appeal to proceed through an attorney not licensed to practice before the district court but that was a member of the bar of the Ninth Circuit signed the corporation's notice of appeal. Id. at **1. *Anunciation* is not at all similar to the instant action, the notice of appeal was filed by licensed counsel.

In *Lewis v. Lenc-Smith Manufacturing Company*, 784 F.2d 829 (7th Cir. 1986), the Seventh Circuit Court of Appeals exercised its discretion in allowing a pro se individual appellant to correctly file an unsigned notice of appeal and file a brief after striking the entry of appearance of her counsel, who was not an attorney. Id. at 831. *Lewis* bears no factual resemblance to the instant action. The issues in *Lewis* are different and it certainly does not require an appellate court to always excuse the failure to file a valid notice of appeal.

In *K.M.A., Inc. v. General Motors Acceptance Corporation*, 652 F.2d 398 (5th Cir. 1981), the Fifth Circuit court of appeals noted that it was unclear whether a non-attorney filing a corporation's notice of appeals is sufficient to deprive the appellate court of jurisdiction. Id at 399. There the court exercised its discretion in granting the appellee's motion to dismiss unless a licensed attorney filed an entry of appearance within 30 days. Id. This decision is yet another example of the discretion that may be exercised by the court of appeals to excuse defects under a specific set of circumstances.

The Eighth Circuit's dismissal of Petitioner's appeal for failure to file a valid notice of appeal is not inconsistent with any decision of this Court or any court of appeals. This is a unique factual scenario under which the Eighth

Circuit exercised its discretion in denying BSB's Motion for Leave and in dismissing the appeal. BSB cannot argue that the filings by its pro se shareholders were ministerial in nature or did not amount to the ongoing practice of law as is condemned in the cases it cites. BSB's entire appeal was prosecuted pro se.

The Eighth Circuit's refusal to grant BSB's Motion for Leave and decision to Dismiss the pro se corporate appeal is not anomalous. Other courts have dismissed or otherwise refused to acknowledge pro se corporate appeals, particularly when the corporation continues to proceed pro se after the notice is filed. In these cases, unlike those cited by BSB, there has been no prompt entry by counsel. This is a critical distinction. See *Muzikowski v. Paramount Pictures Corporation*, 322 F.3d 918 (7th Cir. 2003) (pro se not-for-profit corporate appellant dismissed as a party to the appeal); *Jacobs v. Patent Enforcement Fund, Inc.*, 230 F.3d 565, 568-69 (2nd Cir. 2000) (appeal of pro se corporation dismissed because notice was signed and filed by president of the corporation); *Tamijora, Inc. v. Lubman*, 20 Fed.App.133, 134, 2001 WL 1129122 (4th Cir. (Va.)) (corporate appellant's appeal dismissed for lack of jurisdiction when not represented by counsel and officer filed notice of appeal); *Individual Securities, Ltd. v. Ross*, 152 F.3d 918, 1998 WL 385835 (2nd Cir. (N.Y.)) (corporate appeal dismissed because prosecuted pro se); *E.C. Bowlds v. Hicks*, 33 F.3d 51, 1994 WL 449061 (4th Cir. (N.C.)) (pro se corporate appellant's appeal ignored after its notice was filed pro se and no attorney had appeared); *Biogenics, Inc. v. Kazen*, 6 Fed. Appx. 689, 691, 2001 WL 227415 (10th Cir. (Utah)) (corporation's appeal dismissed because brief was filed pro se after counsel who filed a proper notice of appeal withdrew).

Respondents believe it necessary to address one final issue raised by BSB that they believe is relevant to its Petition. BSB calls this Court's attention to the November 18, 2002 letter from the Clerk of the Eighth Circuit court of appeals. BSB argues it is inherently contradictory for the clerk to have held the appeal in abeyance to allow BSB to obtain counsel and the court to then dismiss the appeal. However, the letter merely gave BSB time to obtain and consult with counsel to determine whether BSB could validate the prior filings.

Specifically stated that at the end of the 30 days the clerk would refer the matter to the court so that the court could determine whether the appeal should be dismissed. No reasonable person could read this letter to mean that the appellate court would not dismiss the appeal if BSB retained licensed counsel. Nor could a reasonable person find this letter and the court's Judgment contradictory. BSB neither argues nor cites authority for the proposition that the Eighth Circuit was required to notify it prior to dismissing the appeal. This letter was nothing more than a courtesy.

CONCLUSION

For all the foregoing reasons Respondent respectfully requests this Court deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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